153 U.S. 540

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 323.

THE ANVIL MINING COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN HUMBLE AND JAMES JOHNS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

FILED OCTOBER 21, 1890.

(14,371.)

(14,371.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 323.

THE ANVIL MINING COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN HUMBLE AND JAMES JOHNS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

INDEX.

	Original.	Print.
Transcript from State court	1	1
Affidavit for attachment	1	1
Return on attachment	2	2
Writ of attachment	8	5
Narr.	9	6
Appearance for defendant	21	13
Calendar entries	22	14
Bond for removal	23	14
Petition for removal	26	15
Clerk's certificate	31	17
Affidavit of W. K. Gibson	32	18
Order granting time to file plea	34	19
Demand for bill of particulars	35	20
Bill of particulars of plaintiffs' demand	36	20
Plea and notice	37	21
Bill of particulars of defendant's set-off	46	25
Affidavit showing death of Joseph H. Johns	50	27
Order reviving cause	51	28
Order beginning trial	52	28

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 6, 1893.

	Original.	Print.
Order continuing trial	53	28
Order continuing trial	54	29
Verdict	55	30
Questions answered by the jury	56	30
Motion for new trial	57	30
Affidavit of Dan. H. Ball	58	31
Order extending time to settle bill of exceptions	59	32
Judgment	60	32
Order fixing time for hearing motion for new trial, granting time to settle bill of exceptions, and staying proceedings	60	32
Order denying motion for new trial	61	33
Bill of exceptions	62	33
Contract between John Humble *et al.* and The Anvil Mining Co., May 1, 1888	62	34
Testimony of John Humble	69	37
Letter of Bennett to Johns Bros. & Humble, July 12, 1888	75	41
Letter of Bennett to Johns Bros. & Humble, October 6, 1888	83	47
Letter of inspector of mines to Bennett, October 4, 1888	83	47
Testimony of George M. Knowles	86	50
James Johns	86	50
John Rowe	90	52
William Christopher	92	54
G. E. Tarbell	93	54
D. A. Bennett	97	57
Letter of Tarbell to Bennett, August 13, 1888	100	59
Letter of Johns Bros. & Humble to Tarbell, August 14, 1888	101	60
Letter of Tarbell to Bennett, October 6	104	61
Testimony of John Souther	105	62
C. M. Boss	105	62
Nicholas Floyd	106	63
David Clifford	106	63
J. Parke Channing	106	63
S. F. Bennett	106	64
Rudolph Stepin	107	64
John Humble (recalled)	107	64
Defendant's requests and rulings thereon	107	65
Charge to jury	110	66
Exceptions to charge	125	75
Judge's certificate to bill of exceptions	127	76
Petition for writ of error	128	77
Bond	130	78
Clerk's certificate	132	79
Writ of error	133	79
Return on writ of error	134	80
Citation	136	80
Proof of service of citation	137	81
Assignment of errors	138	81

1 STATE OF MICHIGAN, } ss:
County of Gogebic, }

John Humble, of Bessemer, in the county of Gogebic and State of Michigan, being duly sworn, deposes and says that he is a member of the firm of John Humble, Joseph H. Johns and James Johns, doing business under the firm name and style of Johns Brothers and Humble, the plaintiffs named in the annexed writ of attachment, and makes this affidavit in their behalf. And that the Anvil Mining Company, the defendant named in the said writ, is justly indebted to said firm in the sum of fifty thousand dollars, as near as may be, over and above all legal set-off, and that the same is now due and payable upon express contract.

And this deponent further says that he knows that the defendant is not a resident of this State, and has not resided therein for three months immediately preceding the time of making this affidavit.

And further, this affiant says that he knows that the said defendant is a foreign corporation.

And further deponent saith not.

JOHN HUMBLE.

Subscribed and sworn to before me this 11th dav of February, A. D. 1889.

ALEX. STORM,
Notary Public.

2 STATE OF MICHIGAN, } ss:
County of Gogebic, }

I do hereby certify that the annexed is a true copy of a writ of attachment to me directed and remaining in my hands; and that the following is a true copy of the inventory made by me of the property and effects which I have seized and taken by virtue of said writ of attachment.

Dated this eleventh day of February, A. D. 1889.

———, *Sheriff.*
———, *Deputy.*

Certificate of Attachment Deposited with Register.

I do hereby certify that the annexed is a true copy of a writ of attachment to me directed and delivered, and by virtue of which I did, on the eleventh day of February, A. D. 1889, attach and seize on the following-described real estate, situated in the county of Gogebic, to wit:

All of the leasehold interest of the defendant in and to the north-east quarter (¼) of section fourteen (14), in town forty-seven (47) north, of range forty-six (46) west, Gogebic county, State of Michigan.

Dated this eleventh day of February, A. D, 1889.

DAVID F. FOLEY, *Sheriff.*
By F. C. McINTYRE, *Deputy.*

Oath of Appraisers.

You do solemnly swear that you will according to your best judgment make a true appraisement of all the property seized by me by virtue of an attachment now in my hands, issued out of the circuit court for county of Gogebic, at the suit of John Humble, Joseph H. Johns and James Johns, copartners doing business under the firm, manner and style of Johns Brothers & Humble, plaintiffs, against the lands, goods, chattels, moneys and effects of the Anvil Mining Company, defendant, so help you God.

GEORGE W. HOGLE,
W. J. HAGERSON,
Appraisers.

Sworn and subscribed to before me this twenty-fourth day of February, A. D. 1889.

F. C. McINTYRE,
Under Sheriff.

3 By virtue of the annexed writ of attachment, I have this day seized and taken the property and effects of which the following is an inventory, to wit: One parcel of real estate situated in the township of Bessemer, in the county of Gogebic, described as follows:

All of the leasehold interest of the defendant in and to the northeast quarter (¼) of section fourteen (14), in town forty-seven (47) north, of range forty-six (46) west; also the following goods and chattels of said defendant in said county as follows:

Boiler and engine house	$1,600 00
Blacksmith shop	290 00
One warehouse	350 00
One boarding house	490 00
One dwelling house and fixtures	500 00
One dry-house	350 00
One boiler and engine house at No. 1 shaft	80 00
One barn	375 00
One shaft house at No. 1 shaft	350 00
One shaft house at No. 2 shaft	125 00
Two out houses and storm shed	60 00
One powder house	45 00
One wood water-tank	125 00
Two sixty-inch tubular boilers and fittings	2,000 00
One forty-two inch tubular and fittings	500 00
One economic boiler	375 00
One portable boiler and engine, and one double engine and drum	1,200 00
One plant of hoisting machinery, including one 18x24 inch cylinder engine, and two sixty-inch drums complete	3,400 00
One water heater	275 00

	One iron water-tank	115 00
	One No. 7 Cameron piston pump	250 00
	One No. 7 Cameron plunger pump	370 00
	Two No. 6 Cameron piston pumps	480 00
	One No. 4 Knowles' pump	160 00
	Two 2½-ton skips	300 00
	Five 60-inch shives	220 00
	Six 12-inch shives	25 00
	One 18-inch shive	4 00
	One 24 inch shive	10 00
	Three movable 14-inch shives	10 00
	750 ft. of ⅝-inch wire rope	100 00
	1,600 ft. of 1⅛-inch wire rope	280 00
	Three iron dump cars	225 00
	Seven wood dump cars	160 00
	Five push cars	55 00
4	Four wheelbarrows	4 00
	Three horses—two horses	275 00
	Two set- of double harness	30 00
	One set of single harness	18 00
	Two saddles	20 00
	Two sleighs	60 00
	One wagon	62 00
	Barn equipments	45 00
	One buck-board buggy	62 00
	Three Rochester lamps	5 00
	Three shade lamps	2 00
	Eight lanterns	4 00
	Two street lamps	10 00
	One set of scales	8 00
	One double-gear-d w-nch	45 00
	Fifty-five single blocks	8 00
	Two set- of double blocks	4 00
	Eighty-seven drills	50 00
	Forty-eight drifting picks	30 00
	Other picks and one set of blacksmith tools	150 00
	One set of blacksmith dies	18 00
	Two anvils	34 00
	One swedge block & bellows	22 00
	Two blacksmith vises	26 00
	Seven stirking hammers	4 00
	One set of horse-shoeing tools	5 00
	One drilling machine and drills	4 00
	Seventeen tons of blacksmith coal	140 00
	One piece of boiler pipe	
	Twenty-five ft. of chain ladder	8 00
	Three log chains	3 00
	Two schoop shovels	
5	One boring machine	10 00
	One ash-pan	8 00

Three stoves	25 00
One hundred feet of canvass, water hose, & fittings	35 00
One hundred feet of bell wire	8 00
Three gongs	9 00
Two jack-screws	20 00
Seven cant-hooks	
Six crow-bar-, seven axes, one broad ax	16 00
Two cross-cut saws, one hand-saw, one buck-saw	8 00
One safe, and office fixtures	250 00
Leasehold above described	45,000 00
Total	$62,232 00

Appraisement of Property.

We, the undersigned freeholders, residing in the county of Gogebic, having been first duly sworn by the deputy sheriff of the county of Gogebec to make a true appraisement of all the property seized by him by virtue of the annexed writ of attachment, do appraise the several articles of property so attached above set forth at the whole value of $61,904.50.

GEORGE W. HOGLE,
W. J. HAGGERSON,
Appraisers.

6 STATE OF MICHIGAN, }
County of Gogebic. }

I do hereby return that by virtue of the annexed writ of attachment I have on this, the eleventh day of February, A. D. 1889, attached the following property, viz., of the Anvil Iron Mining Company, which is named in the within inventory herewith attached, being the leasehold and machinery, tools, and property of said Anvil Iron Mining Company.

All of which said property was appraised by George W. Hogle and W. J. Haggerson, two disinterested freeholders, who were by me first duly sworn to make a true appraisement thereof, and whose appraisal is in writing, signed by themselves and herewith returned; and I do further return that on the day aforesaid I served D. A. Bennett, superintendent of said company, the defendants in said attachment named, with a copy thereof, together with a copy of an inventory of said property, duly certified, as I am commanded, by delivering the same to him personally at the Anvil Iron Mining Company's office in said county.

Dated February 24th, 1889. Fees, $8.00.

In answer of DAVID F. FOLEY,
Sheriff.
By F. C. McINTYRE,
Deputy Sheriff.

7 STATE OF MICHIGAN, } ss:
County of Gogebic, }

I do hereby return that by virtue of the annexed writ of attachment I have on this, the eleventh day of February, A. D. 1889, attached the property, viz., in the inventory hereto annexed.

All of which said property was appraised by ——— and ———, two disinterested freeholders, who were by me first duly sworn to make a true appraisement thereof, and whose appraisal is in writing, signed by themselves and herewith returned; and I do further return that on the day aforesaid I served the said writ of attachment on the defendant in said attachment named, with a copy thereof, together with a copy of an inventory of said property, duly certified, as I am commanded, by delivering the same to D. A. Bennett, its superintendant and agent.

The answer of DAVID F. FOLEY,
Sheriff.

By F. C. McINTYRE,
Deputy Sheriff.

8 *Circuit Court Attachment.*

STATE OF MICHIGAN, } ss:
County of Gogebic, }

The Circuit Court for the County of Gogebic.

In the name of the people of the State of Michigan. To the sheriff of the county of Gogebic, greeting:

[SEAL.] You are commanded to attach so much of the lands, tenements, goods, chattels, moneys, and effects of the defendant, The Anvil Mining Company * * * not exempt from execution, wheresoever the same may be found within the county of Gogebic, *and* will be sufficient to satisfy the demand of John Humble, Joseph H. Johns, and James Johns, copartners under the firm name and style of Johns Brothers & Humble, plaintiffs, and costs of writ, and safely keep the same to satisfy any judgment that may be recovered by the plaintiffs in this attachment.

And in case you shall seize any property of said defendant in said county, but not sufficient to satisfy said demand and costs, then you are hereby further commanded to seize other property of said defendant subject to attachment, sufficient with that seized in said county of Gogebic to satisfy said demands and costs, wherever the same may be found in the State of Michigan.

You are also commanded to summon the defendant of he be found in said county of Gogebic or in any other county of the State of Michigan where you may have seized property under and by virtue of this writ, to appear before the circuit court for the county of Gogebic, at the court-house in the village of Bessemer, on Tuesday, the fifth day of March, 1889, at 10 o'clock in the forenoon of said day, to answer to plaintiffs; and of this writ make due return.

Witness the Honorable William D. Williams, circuit judge, at the

village of Bessemer, this eleventh day of February, in the year of our Lord one thousand eight hundred and eighty-nine.

CONRAD CARLSON, *Clerk.*
By ALEX STROM,
Deputy Clerk.

KUTTS & WILSON,
Att'ys for Plaintiffs.

Endorsed: Filed February 28th, 1889.

CONRAD CARLSON, *Clerk.*
By ALEX STROM, *Deputy*

State of Michigan, in the Circuit Court for the county of Gogebic.

JOHN HUMBLE, JOSEPH H. JOHNS, and JAMES JOHNS, copartners doing business under the firm name and style of John Brothers and Humble,

vs.

THE ANVIL MINING COMPANY, a foreign corporation doing business in this county and State.

COUNTY OF GOGEBIC, *ss:*

John Humble, Joseph H. Johns and James Johns, copartners doing business under the firm name and style of Johns Brothers and Humble, plaintiffs in this suit, by Kutts and Wilson, their attorneys, complain of the Anvil Mining Company, a corporation organized under the laws of the State of Wisconsin and doing business in this county and State, defendant in this suit, the said defendant having been duly summoned to answer the said plaintiffs of a plea of trespass upon the case upon promises.

For that whereas the said defendant on, to wit, the first day of May, A. D. 1888, made and entered into a certain contract with the said plaintiffs for mining iron ore in said county, which said contract was in writing, and in words and figures following, to wit: "This agreement made and concluded by and between John Humble, Joseph H. Johns and James Johns, all of the township of Bessemer, in the county of Gogebic and State of Michigan, party of the first part, and the Anvil Mining Company, a body politic and corporate, party of the second part, witnesseth: that the said party of the first part, for and in consideration of the covenants hereinafter contained, and on the party of the second part to be kept and performed, have covenanted and agreed and do hereby covenant and agree to and with the party of the second part, its successors and assigns, that they, the said party of the first part, shall and will, in a good and workmanlike manner, and at their own proper charge and expense, mine, remove and load into the skips all the merchantable iron ore contained on or above the first level of the mine now owned and worked by the said Anvil Mining Company at its No. 1 shaft in said township of Bessemer. The said ore shall be mined and removed by what is known as the caving system and the ore removed shall be at least seventy-five per cent. (75 per cent.) of the merchantable iron ore contained in and above said first level

and shall be worked, taken out, and removed in such manner as not to interfere with the future working and development of said mine. Said party of the first part shall work said mine to its full capacity and remove the ore therefrom without unnecessary delay and shall mine from said level at least two hundred (200) tons of merchantable iron ore per day, that is, the average amount of ore removed each month shall not be less than two hundred (200) per day. It is understood and agreed between the parties hereto that should it be determined by said second party that the ore from the second and third levels of said mine can be removed and extracted by the caving system of mining, or by the same system practiced in removing the ore from the said first level, that this contract, at the option of said second party, shall extend to and include the ore contained on and above the second and third levels of said mine. It is also agreed that it shall be entirely optional with said party of the second part to extend this contract to the ore below the second level, and that the said party of the second part shall have the right of terminating this contract and the said system of mining at any time, when said second party shall decide that system is prejudicial to the future welfare and development of said mine, equitable compensation to be made said party of the first part for damage suffered by them by reason of said party of the second part so terminating this contract and should said parties be unable to agree upon the basis of settlement then the matter shall be left to two disinterested mining superintendents, one to be chosen by the party of the first part, and
11 the other to be chosen by the party of the second part, and in case said referees fail to agree they shall choose a third, and the decision of said referees shall be final and conclusive upon the parties hereto as the compensation to be made said party of the first part, because of the termination of this contract. The said party of the first part agrees that the said party of the second part shall have the use of number one shaft for the purpose of raising either rock or ore from said mine, in the sinking of said shaft, and developing said mine below the first level. This privilege to use No. one shaft is to be considered to apply only to the removal of ore, rock, or other material necessary to be taken out in sinking said shaft and in drifting and cross-cutting and opening up the lower levels. The ore to be taken out by said party of the first part under this contract shall be merchantable iron ore, containing at least fifty-six (56) per cent. or upwards of metallic iron, and no ore of lower grade shall be accepted or paid for by said party of the second part. The said party of the first part are to mine said ore and place the same in the skip at No. 1 shaft in said mine ready for hoisting, the ore to be hoisted at the expense of the said party of the second part, who agree to furnish all the necessary power to properly run the skip in No. 1 shaft for the purpose of hoisting the ore mined and placed therein by the party of the first part; but this covenant shall not deprive the party of the second part of the right to use said skip for the purpose and in the manner hereinbefore provided. In case

of any accident to said machinery, said party of the second part shall not be liable for any damages sustained by said party of the first part caused by delay in replacing or repairing said machinery, provided the said party of the second part shall cause the same to be replaced with all reasonable diligence. The said party of
12 the first part are to take out all of the ore which can possibly be taken out under the caving system of mining, and in no case shall the amount taken out be less than seventy-five (75) per cent. of the ore contained therein, as above agreed. The party of the second part are to have the right or privilege of superintending and directing said work, and for that purpose to enter said mine and inspect the works thereof at any time for the purpose of seeing that the work is properly conducted by said first party, and that the work so done is not prejudicial to the future interest and working of said mine. It is further expressly stipulated and agreed that the said party of the second part shall not under any circumstances be liable for any damages or injury to either person or property by reason of the carelessness or negligence of the said party of the first part or of the workmen, apprentices, or other persons in their employ, in the furtherance of this contract, and that the said party of the first part shall and will indemnify and forever save harmless the said party of the second part from all actions, claims, suits, and damages by reason thereof. In consideration whereof the said party of the second part covenants and agrees to and with the said party of the first part to pay to them, the said party of the first part, the sum of sixty cents (60 cts.) for each and every gross ton of merchantable iron ore mined and removed by the said party of the first part from the said mine under this contract, each gross ton to contain two thousand two hundred and forty (2,240) pounds avoirdupois. The amount of ore shipped from said premises and the amount due said party of the first part therefor shall be determined by and based upon the weights as ascertained by the reports of the railroad company or companies, made to said party of the second part, of the shipment of the ore from said mine, in case of the shipment of the ore so mined from said premises. In case the ore so mined is stockpiled the said party of the first
13 part to be paid seventy five per cent. (75) of the amount coming to them for ore mined and placed in stock pile, the amount to be estimated and measured by the parties hereto; and in case the said parties fail to agree upon the number of tons of ore placed in stock pile, the amount to be estimated and measured by the parties hereto; and in case the said parties fail to agree upon the number of tons of ore placed in stock pile aforesaid, then in that case the amount shall be estimated and determined by C. M. Boss, civil engineer, of Bessemer, Michigan, whose decision as to the number of tons in said stock pile shall be final and conclusive on the parties; and in case said Boss is absent or unable to act, then by some competent engineer to be agreed upon by the parties; and in case the parties can not agree, then by the mining inspector of Gogebic county, Michigan, but such estimate may be corrected by either

party by the reports of the shipments of ore upon shipment of the same. The remaining twenty-five (25) per cent. of the ore so stockpiled to be paid said party of the first part as soon as same is shipped from the said mine. And it is further understood and agreed that the ore mined and stockpiled during any season shall be shipped before the close of navigation in the season that the same is mined. In case said party of the second part, shall fail to ship the ore so stockpiled before the close of navigation, the said twenty-five (25) per cent. so retained shall be paid said party of the first part on or before the first day of December in said year. It is further understood and agreed that said party of the first part shall not be at liberty to assign this contract without the consent of the party of the second part in writing first had and obtained for that purpose, and in case of the assignment of this contract without the consent of said second party, said second party shall be at liberty to declare this contract void and of no effect and in that case the rights of said
14 first party shall cease and determine. Payment shall be made by the party of the second part to said party of the first part on or before the twenty-fifth (25th) day of each and every month for the ore mined by the party of the first part under this contract during the month immediately preceding; that is to say, payments shall be made not later than the twenty-fifth (25th) day of June for all ore mined by said party of the first part during the month of May preceding, and so on each month. It is further understood and agreed between the parties hereto that all timber saved by the parties of the first part from the first level may be used by them without charge or cost in the mining of iron ore under this contract. This contract shall bind the said party of the first part, their heirs, executors, and administrators, and shall bind said party of the second part, its successors and assigns. In witness whereof the said party of the first part have hereunto set their hands a*b*d seals; and the said party of the second part have caused these presents to be executed by its president and attested by its secretary, and its corporate seal to be hereunto attached this 1st day of May, in the year of our Lord one thousand eight hundred and eighty-eight.

In the presence of—

JOHN HUMBLE. [SEAL.]
JOSEPH H. JOHNS. [SEAL.]
JAMES JOHNS. [SEAL.]

[CORPORATE SEAL.] ANVIL MINING COMPANY:
M. M. BRAND, *President.*
G. E. TARBELL, *Secretary.*

And the said plaintiffs on, to wit, the day and year aforesaid at the township of Bessemer, in the county aforesaid, entered upon the performance of the contract so made and entered into as aforesaid, and then and there commenced the carrying out of said *of said* contract and doing and performing all things by them to be done and performed according to the conditions and specifications of said contract.

And the plaintiffs allege that while engaged in the per-
15 formance of said contract on their part and from, to wit, the-
8th day of May to the 12th day of July, A. D. 1888, they were frequently hindered and delayed by said defendant in the performance of their said contract by said defendant failing, neglecting and refusing to furnish necessary cars for the removal of said ore as fast as the same could be mined by said plaintiffs, and neglecting to hoist said ore when mined and placed in the skip, and in dumping large quantities of said ore after the same had been mined and placed on board the cars, and also that said defendant neglected and refused to make the necessary drifts and cross-cuts, and do the proper and necessary timbering, laying necessary tracks for running cars, and refused and neglected to furnish the necessary surfacemen to properly tend signals and the unloading of said ore after the same was mined, for properly operating of said mine and removing the ore therefrom, and failed and neglected to make payments according to the terms and conditions of said contract, and the said plaintiffs were obliged to put a large amount of timber in said mine at their own expense.

And the said plaintiffs allege that they were greatly hindered and delayed in and about the performance of the conditions of the said contract so to be performed by them as aforesaid to the damage of the said plaintiffs of the sum of ten thousand dollars.

Yet the said defendant, disregarding its duty in that behalf, has wholly neglected and refused and still neglects and refuses to perform the duties and conditions so to be done and performed by it as stated in the contract hereinbefore set forth, and have greatly hindered and delayed and obstructed the said plaintiffs in carrying out and performing the conditions of said contract so to be performed by said plaintiffs as aforesaid, and on, to wit, the 12th day of July, A. D. 1888, refused and prevented the said *the said* plaintiffs
from proceeding further in the carrying out of said contract on
16 their part, and has from thence hitherto wholly prevented said plaintiffs from carrying out on their part the terms and conditions of said contract, although the said plaintiffs are and at all times have been and still are ready and willing to carry out and perform all and every the terms and conditions of said contract by them to be done and performed.

By means whereof the said plaintiffs have been hindered and prevented from earning and receiving large profits and gains which they otherwise could and would have received under the terms and conditions of said contract, to the damage of the said plaintiffs the sum of sixty thousand dollars.

And for that whereas the said defendant on, to wit, the twenty-third day of July, A. D. 1888, made and entered into a certain other contract with the said plaintiffs for mining iron ore in said county, which said contract was in writing, and in words and figures the same as the contract hereinbefore set forth, with an ad-enda in the words and figures following, to wit: "It is mutually agreed by the parties to the within agreement that this contract shall extend to and include

the ore contained on and above the second and third levels as named therein, with the exception that the merchantable iron ore extracted shall contain at least fifty-eight (58) per cent. or upwards of metallic iron.

In witness whereof, we have hereunto set our hands and seals this 10th day of July, A. D. 1888.

JAMES JOHNS. [SEAL.]
JOS. H. JOHNS. [SEAL.]
JOHN HUMBLE. [SEAL.]
ANVIL MINING CO.,
D. A. BENNETT, *Sup't.*"

In presence of—
R. STEPAN.

And the said plaintiffs on, to wit, the day and year last aforesaid, at the township of Bessemer, in the county aforesaid, entered upon the performance of the contract so made and entered into as aforesaid, and then and there commenced the carrying out of the same, and doing and performing all things by them to be done and
17 performed according to the terms and conditions of said contract.

And the said plaintiffs aver that while engaged in the performance of said contract on their part and from, to wit, the said 23d day of July, A. D. 1888, to the 16th day of October, A. D. 1888, they were frequently hindered and delayed by said defendant in the performance of their said contract by said defendant failing, neglecting, and refusing to furnish necessary cars for the removal of said ore as fast as the same could be mined by said plaintiffs, and neglecting and refusing to hoist said ore when mined and placed in the skip and in dumping large quantities of said ore after the same had been mined and placed on board the cars, and also that defendant neglected and refused to make the necessary drifts and cross-cuts and do the proper and necessary timbering, laying necessary tracks for running cars, and refused and neglected to furnish the necessary surfacemen to properly tend signals and the unloading of said ore after the same was mined, for properly operating said mine and removing the ore therefrom, and failed and neglected to make payments according to the terms and conditions of said contract, by reason whereof the said plaintiffs were obliged to and did pay out and expend large sums of money, to wit, the sum of one thousand dollars in laying said track and in furnishing the necessary surface men to tend signals and unload said ore, and in drifting and cross-cutting and developing said mine and furnishing the necessary timber for properly operating said mine.

And the plaintiffs allege that they were greatly hindered and delayed in and about the carrying out and performing the terms and conditions of the said contract so to be done and performed by them as aforesaid to the damage of the said plaintiffs of the sum of ten thousand dollars.

Yet the said defendant, disregarding its duty in that behalf, has

wholly neglected and refused and still neglects and refuses to
18 perform the duties and conditions so to be done and performed by it as stated in the contract hereinbefore last set forth, and have greatly hindered and delayed and obstructed the said plaintiffs in carrying out and performing the conditions of said contract so to be done and performed by said plaintiffs as aforesaid.

And on, to wit, the 16th day of October, A. D. 1888, refused and prevented the said plaintiffs from proceeding further in the carrying out of said contract on their part, and has from thence hitherto wholly prevented said plaintiffs from carrying out on their part the terms and conditions of said contract, although the said plaintiffs are and always have been and still are ready and willing to carry out and perform all and every the terms and conditions of said contract by them to be done and performed, by means whereof the said plaintiffs have been hindered and prevented from earning and receiving large profits and gains which they otherwise could and would have received under the terms and conditions of said contract to the damage of the said plaintiff of the sum of sixty thousand dollars.

And for that whereas the said defendant on, to wit, the 28th day of July, A. D. 1888, made and entered into a certain other verbal contract with the said plaintiffs for sinking and extending shaft No. 1 of said mine, between the third and fourth levels in said mine as follows, to wit, said shaft so extended by said plaintiffs was to be six by ten feet in the inside, lined with two-inch plank, and timbered with 8 by 8-inch timbers, and was to be excavated and extended forty feet; said excavating was to be done by said plaintiffs and the defendants *was* to furnish all the necessary material. The said plaintiffs were to have the services of the company's blacksmith and to pay said blacksmith at the rate of sixty dollars per month, and to complete said shaft in a good and workman-
19 like manner and with all convenient speed, said sinking, excavating, and extending said shaft as aforesaid to be commenced on the first day of August, A. D. 1888, for which the said defendant, by the terms and conditions of said contract, was to pay to the said plaintiffs the sum of thirty-two and 50-100 dollars per foot.

And the said plaintiffs, in pursuance of said agreement, hired said blacksmith and paid to said blacksmith for his services for one month the sum of fifty-nine and 62-100 dollars, and made all necessary arrangements to enter upon the performance of said contract, and were on said first day of August and ever since have been ready and willing to carry out the terms and conditions of said agreement in all things by them to be done and performed.

And the said plaintiffs aver that they might and would have made large profits and gains by the performance of the said contract. Yet the said defendant, disregarding its duty in that behalf, on the first day of August aforesaid, and from thence hitherto, has wholly neglected and refused to carry out the conditions of said contract on its part, and has hindered and prevented the said plaintiffs

from carrying out said contract on their part to the plaintiffs' damage of five hundred dollars.

And for that whereas the defendant heretofore, to wit, on the first day of December, A. D. 1888, at the township of Bessemer, in said county, became and was indebted to the plaintiffs in the sum of ten thousand dollars for the price and value of goods then and there sold and delivered by the plaintiffs to the defendant at its request.

And in a like sum for the price and value of work then and there done, and materials furnished for the same provided by the plaintiffs for the defendant at its request.

And in a like sum for money then and there lent by the plaintiffs to the defendant at its request.

20 And in a like sum for money then and there paid by the plaintiffs for the use of the defendant at its request.

And in a like sum for money then and there received by the defendant for the use of the plaintiffs.

And in a like sum for money then and there found to be due from the defendant to the plaintiffs on an account stated between them.

And thereupon the said defendant afterwards and on the day and year aforesaid, in consideration of the premises respectively, then and there promised the plaintiffs to pay to them the said several sums of money respectively on request. Yet the said defendant has disregarded its said promises, and has not, although often requested so to do, paid any of the said sums of money or any part thereof to the plaintiffs' damage — seventy-five thousand dollars, and therefore they bring suit.

KUTTS AND WILSON,
Attorneys for Plaintiffs.

Compared & corrected.

Endorsed: State of Michigan, Gogebic circuit court. John Humble, Joseph H. Johns, & James Johns *vs.* Anvil Mining Company. Received and filed March 6th, 1889. Conrad Carelson, clerk. Kutts and Wilson, att'y- for plaintiff–.

20½ [Endorsed on cover:] U. S. circuit, N. div., W. dist of Mich. Johns Bros. & Humble *vs.* Anvil Mining Co. Narr.

21 State of Michigan, the Circuit Court for the County of Gogebic.

JOHN HUMBLE, JOSEPH H. JOHNS, and JAMES JOHNS *vs.* THE ANVIL MINING COMPANY. } Dated March 5th, A. D. 1889.

In this cause, on motion of M. M. Riley, attorney for defendant, it is ordered that the appearance of said defendant be, and the same is hereby, entered.

M. M. RILEY,
Att'y for Def't.

From common-rule book.

22 Copy of Circuit Court Calendar for Gogebic County, page 308.

JOHN HUMBLE, JOSEPH H. JOHNS, and JAMES JOHNS, vs. THE ANVIL MINING COMPANY.	Plaintiffs' Attorneys, Kutts and Wilson. Attachment. Defendant's Attorney, M. M. Riley.

Feb'y 11th, 1889. Writ issued.
" 25th, " Sheriff's return filed.
March 6th, " Declaration filed.
April 2d, " Filed petition of defendant for removal.
" " " Bond.
March 5th, " Defendant's appearance entered.

23 State of Michigan, Circuit Court for the County of Gogebic.

JOHN HUMBLE, JOSEPH H. JOHNS, and JAMES JOHNS, copartners doing business under the firm name and style of JOHNS BROS. & HUMBLE, Plaintiffs,

vs.

ANVIL MINING COMPANY, a foreign corporation doing business in this County and State, Defendant.

Know all men by these presents, that Anvil Mining Company, a corporation duly organized and existing under the laws of the State of Wisconsin, as principal, and Peter Horne as surety, are held and firmly bound unto John Humble, Joseph H. Johns, and James Johns, copartners doing business under the firm name and style of Johns Bros. & Humble, and all other persons whom it may concern, in the penal sum of two hundred and fifty dollars ($250), for the payment of which, well and truly to be made, we bind ourselves, our heirs, representatives and assigns, jointly and severally, firmly by these presents.

The condition of this obligation is such that the said Anvil Mining Company having petitioned the circuit court for the county of Gogebic, in the State of Michigan, for the removal of a certain cause therein pending, wherein John Humble, Joseph H. Johns, and James Johns, copartners doing business under the firm name and style of Johns Bros. & Humble, are plaintiffs, and Anvil
24 Mining Company is defendant, to the circuit court for the United States in and for the western district of Michigan.

Now, therefore, if the said Anvil Mining Company, said petitioner, shall enter in said circuit court of the United States for the western district of Michigan, on the first day of its next session, a copy of the record in said suit or action, and shall well and truly pay or cause to be paid all costs that may be awarded by the said circuit court of the United States for the western district of Michigan if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise to remain in full force and virtue.

In witness whereof the said Anvil Mining Company has caused these presents to be signed by its secretary and its corporate seal

to be hereunto affixed on the 1st day of April A. D. 1889, and said Peter Horne, the surety above named, hath hereunto set his hand and affixed his seal this 2d day of April 1889.

ANVIL MINING COMPANY,
[L. S.] By R. L. DINGWALL, *Sec'y.*
PETER HORNE. [SEAL.]

25 STATE OF MICHIGAN. } ss:
County of Gogebic, }

Peter Horne, being first duly sworn, on oath deposes and says that he is a resident of Bessemer, in the county of Gogebic, in the State of Michigan; that he signed the foregoing bond as surety thereto; that he is a freeholder of the State of Michigan; that he is worth the sum of five hundred dollars over and above all his debts and liabilities in property situated within the State of Michigan exclusive of property by law exempt from execution and exclusive of all exemptions.

PETER HORNE.

Subscribed and sworn to before me this second day of April, A. D. 1889.

ALEX STROM,
Notary Public for Gogebic Co., Mich.

26 State of Michigan, Circuit Court for the County of Gogebic.

JOHN HUMBLE, JOSEPH JOHNS and JAMES JOHNS, (copartners doing business under the firm name and style of JOHNS BROS. & HUMBLE), Plaintiffs,

vs.

ANVIL MINING COMPANY, a foreign corporation doing business in this county and State, defendant.

To the honorable, the circuit court for the county of Gogebic in the State of Michigan:

The petition of Anvil Mining Company, the defendant above named, respectfully shows to the court and alleges that your petitioner is the defendant in the above-entitled action, and that the matter in dispute therein exceeds, exclusive of interest and costs, the sum or value of two thousand dollars; that said suit is of a civil nature and is brought by the plaintiffs above named, John Humble, Joseph H. Johns and James Johns (copartners doing business under the firm name and style of Johns Bros. & Humble), against the above-named defendant to recover damages
27 alleged in substance to have accrued to said plaintiffs by reason of the alleged breach by said defendent of the covenants contained in the written contract between said plaintiffs and said defendant, of which contract a copy is given in the declaration in said action, and by reason of the alleged hindrance by said defendant of said plaintiffs in the performance of said contract, and by reason of the alleged neglect and refusal of said defendant to fur-

nish the necessary cars for the removal of ore, and by reason of sundry other acts and omissions of said defendant in relation to the said contract and its subject-matter, whereby said plaintiffs claim to have been damaged in the sum of seventy-five thousand dollars; that said plaintiffs have commenced and maintained said action in their own right, and not as assigns in any manner of the cause or causes of action alleged in said declaration; that this application for removal is made herein before your petitioner is required by the laws of the State of Michigan or any rule of said circuit court for the county of Gogebic, in which said action is brought, to answer or plead to the declaration of the plaintiffs; that in said action there is controversy which is wholly between citizens of different States; that said plaintiffs, and each of them, were, at the time of the commencement of said action, for a long time prior thereto had been, ever since have been and still are, citizens of the State of Michigan; that at the time of the commencement of said action, and for a long time prior thereto, the said defendant, Anvil Mining Company, was and had been
28 and ever since the commencement of said action has been and still is resident and citizen of the State of Wisconsin.

Your petitioner offers herewith a bond with good and sufficient surety for his entering in the circuit court of the United States for the western district of Michigan, on the first day of its next session or term, a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto, and it prays this court to proceed no further herein except to make an order for the removal hereof to the said circuit court of the United States for the western district of Michigan, and to accept such surety and bond, and to cause the record herein to be removed into said circuit court of the United States in and for the western district of Michigan.

ANVIL MINING COMPANY,
By R. L. DINGWALL, *Sec'y.*

M. M. RILEY,
Attorney for said Defendant and Petitioner.
WINKLER, FLANDERS, SMITH, BOTTUM & VILAS,
Of Counsel.

STATE OF MICHIGAN, }
County of Milwaukee. }

R. L. Dingwall, being first duly sworn, on oath deposes and says: I am the secretary of the Anvil Mining Company, the defendant and petitioner above described; said Anvil Mining Company is a corporation organized and existing under the laws of the
29 State of Wisconsin; I am authorized to and do make this verification on behalf of said Anvil Mining Co., defendant and petitioner above described; the reason why said verification is not made by said Anvil Mining Co. is that the same is a corporation; I have heard read the foregoing petition and know the contents thereof; said petition is true to my own knowledge, except

as to the matters therein stated on information and belief, and as to those matters I believe it to be true.

The grounds of my knowledge and belief are investigation of the records and papers of said corporation; statements made to me by the officers of said corporation, and examination of the contract set out in the declaration in said action, and said declaration and statements made to me by other persons.

R. L. DINGWALL.

Subscribed and sworn to before me this first day of April, A. D. 1889.

CHAS. L. GOSS,
Notary Public, Milwaukee Co., Wis.

State of Wisconsin, County of Milwaukee, Office of the Clerk of the Circuit Court.

I, A. DeLuer, clerk of the county of Milwaukee, in the State of Wisconsin, the said court being a court of record and having a seal, do hereby certify that Chas. L. Goss, Esq., whose name appears subscribed to the annexed instrument, was, at the date thereof, a notary public within and for said State, residing in said county, duly appointed and empowered by the town of said State to administer oaths, take depositions and acknowledgments of deeds, and perform such other duties as by the law of nations and according to commercial usage may be performed by notaries public, and that to his acts and attestations as such full faith and credit is and ought to be given in court and out.

I further certify that I am well acquainted with the signature and handwriting of said Goss, and I verily believe said signature purporting to be his is genuine; that the seal thereto attached is a correct impression of his official seal, and that said instrument is executed and acknowledged according to the laws of said State.

In witness whereof I have hereunto set my hand and affixed the seal of said court at Milwaukee, in said county and State of Wisconsin, on this first day of April, one thousand eight hundred and eighty-nine.

A. DeLEUR,
[SEAL.] *Clerk of Circuit Court as aforesaid.*

Certificate of Copy of Record.

STATE OF MICHIGAN, } ss:
Gogebic County, }

I, Conrad Carlson, clerk of the circuit court of said county, the same being a court of record and having a seal, do hereby certify that I have compared the foregoing copy of the record and proceedings in a case entitled John Humble, Joseph H. Johns and James Johns *vs.* The Anvil Mining Company, with the original record and files thereof now remaining in my office, and have found the same to be a correct transcript therefrom, and the whole of such original record and files.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at the city of Bessemer this 4th day of May, A. D., 1889.

CONRAD CARLSON.

[Seal of circuit court.]

Endorsed: John Humble, Joseph H. Johns and James Johns *vs.* The Anvil Mining Company. Filed May 7th, 1889.

F. M. MOORE, *Dep. Clerk.*

32 United States of America. The Circuit Court of the United States for the Western District of Michigan, Northern Division.

JOHN HUMBLE, JOSEPH JOHNS AND JAMES JOHNS,
vs.
ANVIL MINING COMPANY, a Corporation.

EASTERN DISTRICT OF MICHIGAN, *ss:*

William K. Gibson, being duly sworn, says that he is one of the counsel in the above case, but has no charge of the case in the way of putting in the plea or preparing the case for trial upon the facts; that deponent was employed in matters relating to the transfer of said case from the circuit court for the county of Gogebic, in the State of Michigan, to the circuit court of the United States for the western district of Michigan; that the petition for such transfer was duly made and filed in the said circuit court for Gogebic county, and afterwards, and on the seventh day of May instant, deponent caused to be filed in the said circuit court of the United States a certified copy of the whole record and proceedings in said cause. That at the time of the filing of the same at the date last named, no plea had been filed in said case. That on his way to file such certified copy, this deponent was at Milwaukee, and there saw James G. Flanders, Esq., one of the counsel for defendant in said case, and who has the particular charge of said case; that said Flanders then stated that he had not been put in possession of the particular facts of the defense to an extent to enable him to draw the plea in said case, and that he was about to go to the city of New York in a few days, and should have no opportunity to ascertain the matters
33 necessary to enable him to prepare the plea till after his return, and desired deponent at the time of filing the certified copy of the proceedings in this court to obtain an order extending the time for filing such plea.

That on deponent's arrival at Marquette he learned that the circuit judge would not be present on the first day of the term, and deponent thereupon took steps to make this application for such order in the case; that deponent verily believes these statements made to him, as aforesaid, by said James G. Flanders, Esq., and that said Flanders has been so situated as to be unable to put in a proper plea in the time required by the rules; that this application is not

made by deponent for delay merely, but to obtain the time necessary to have a proper plea filed in the case, which deponent thinks can be done within the next twenty or thirty days; that deponent himself knows nothing about the defense which will be made for the reason that he is not conversant with the history of defendant's case.

W. K. GIBSON.

Sworn & subscribed before me this 25th day of May, 1889, at Jackson, Michigan.

HENRY E. EDWARDS,
Notary Public in and for Jackson Co., Mich.

Endorsed: Circuit court of the United States for the western district of Michigan. John Humble *et al. vs.* Anvil Mining Company. Affidavit for order. Filed May 31st, 1889. F. M. Moore, dep. clerk. Winkler, Flanders, Smith, Bottum & Vilas, def'ts' att'ys.

34 Circuit Court of the United States for the Western District of Michigan, Northern Division.

JOHN HUMBLE, JOSEPH JOHNS, and JAMES JOHNS,
vs.
ANVIL MINING COMPANY, a corporation.

Upon application made in said suit before the Hon. Henry F. Severens, dist. judge, at chambers, on the 25th day of May, A. D. 1889.

It having been made to appear by the affidavit of William K. Gibson, Esq., one of the defendant's counsel in the above-entitled case, that the same has been transferred from the circuit court for the county of Gogebic, State of Michigan, to the above court, and that no plea has been filed therein, and that the defendant should have further time to plead, it is therefore ordered, on motion of said Williamson of the counsel for defendant, that the said defendant have twenty days from and including this date in which to file and serve plea for the defendant therein.

Dated, May 25th, 1889.

H. F. SEVERENS,
District Judge.

Endorsed: Circuit court of the United States for the eastern district of Michigan. John Humble *et al. vs.* The Anvil Mining Company. Order extending time to plead. Filed May 31st, 1889. F. M. Moore, dep. clerk. Winkler, Flanders, Smith, Bottum & Vilas, of counsel for defendant.

35 United States Circuit Court, Western District of Michigan, Northern Division.

JOHN HUMBLE, JOSEPH H. JOHNS AND JAMES JOHNS, copartners doing business under the firm name and style of Johns Brothers and Humble,

vs.

ANVIL MINING COMPANY, a foreign corporation doing business in the State of Michigan.

SIR: Please to take notice that the defendant in this cause is required to furnish to the plaintiffs' attorneys an account in writing of the particulars of its demand, which it has given notice under its plea of the general issue that it will set off against the demand of the said plaintiffs, and you will further take — that the defendant in this cause is required to furnish to the plaintiffs' attorneys an account in writing of the particulars of its damages which it has given notice under its said plea that it will claim by way of recoupment against the demand of said plaintiffs.

Dated June 14th, 1889.

Yours, etc., KUTTS & WILSON,
Attorneys for Plaintiffs.

To M. M. Riley, attorney for defendant.

Endorsed: United States circuit court, western district of Michigan, northern division. John Humble, Joseph Johns and James Johns *et al.*, pl'ffs, *vs.* Anvil Mining Company, def'ts. Demand for bill of particulars. Filed June 15, 1889. Kutts & Wilson, attorneys for plaintiffs. F. M. Moore, dep. clerk.

36 United States Circuit Court Western District of Michigan, Northern Division.

JOHN HUMBLE, JOSEPH H. JOHNS and JAMES JOHNS, copartners, etc.,

vs.

ANVIL MINING COMPANY.

To M. M. Riley, attorney for defendant:

Please take notice that the following is a bill of particulars of the plaintiffs' demand in the above-entitled cause:

Loss of profits and gains on ore which the defendant refused to let the said plaintiffs mine, remove, and load into skips under the terms and conditions of the contract set forth and pleaded in the first count of plaintiffs' declaration, $50,000.00.

Loss and profits and gains on ore which the defendant refused to let said plaintiffs mine, remove, and load into skips under the terms and conditions of the contract set forth and pleaded in the second count of plaintiffs' declaration, $50,000.00.

Loss of profits and gains on sinking and extending shaft No. 1, which the defendant refused to let the said plaintiffs do and perform under the terms and conditions of the contract set forth and pleaded in the third count of plaintiffs' declaration, $3,000.00.

Loss and damage suffered for money paid employés while hindered and delayed by defendant in carrying out and performing the terms and conditions of the several contracts set forth and pleaded in the first, second and third counts of the plaintiffs' declaration, $5,000.00.

Damages for work and labor done and performed in cross-cutting and timbering said mine and materials furnished for the same, $5,000.00.

Balance due on ore mined and placed in skip by plaintiffs for defendant under the several contracts pleaded as aforesaid, $5,000.00.

Dated July 5th, 1889.

KUTTS & WILSON,
Att'ys for Plaintiffs.

Endorsed: Bill of particulars of plaintiffs' demand. Kutts & Wilson, attorneys for plaintiffs.

37 Circuit court of the United States for the Western District of Michigan, Northern Division.

THE ANVIL MINING COMPANY, a foreign corporation, doing business in the State of Michigan,
ads.
JOHN HUMBLE, JOSEPH H. JOHNS and JAMES JOHNS, copartners, doing business under the firm name and style of Johns Brothers & Humble.

WESTERN DISTRICT OF MICHIGAN, *ss:*

And the said defendant, by M. M. Riley, Esq., its attorney, comes and demands a trial of the matters set forth in said plaintiffs' declaration.

M. M. RILEY,
Defendant's Attorney.

To the above-named plaintiffs:

You will please take notice that under the general issue above pleaded, the said defendant will give in evidence and insist upon the trial of said cause: that at the time of the commencement of this action the said plaintiffs were and still are indebted to the said defendant, to wit, in the sum of ten thousand dollars, for the
38 price and value of goods then and there sold and delivered by the defendant to the plaintiffs at their request; and in the like sum for the price and value of work then and there done and materials furnished by the defendant for the plaintiffs, and at their request; and in a like sum for money then and there lent by the defendant to the plaintiffs at their request; and in a like sum of money then and there paid by the defendant for the use of the plaintiffs at their request; and in a like sum for money then and there received by the plaintiffs for the use of defendant; and in a like sum of money then and there found to be due from the plaintiffs to defendant on an account stated between them, which said several amounts the said plaintiffs, afterwards and before the commencement of this suit, then and there promised the defendant to pay on

request, but that the plaintiffs have disregarded their said promises, and have not, though often requested, paid said sums of money, or any of them, to the defendant's damage of sixty thousand dollars, which said amount said defendant will prove upon the trial of said cause, and set off the same against the claim of said plaintiffs, and if there shall be any balance or surplus have the same certified in defendant's favor.

And the said defendant will also, under the general issue above pleaded, give in evidence upon the trial of said cause and insist that if any such contract or contracts was or were entered into between the said plaintiffs and said defendant, as set forth in said declaration, that the said plaintiffs did not, as by them covenanted and agreed in their said contract, in a good and workmanlike manner and at their proper charge and expense, mine, remove, or
39 load into the skips all the merchantable iron ore contained on or above the first level of the mine owned and worked by said Anvil Mining Company at its number one shaft in said township of Bessemer; on the contrary, the said plaintiffs absolutely failed to remove all of such merchantable iron ore and left large quantities which were not removed and loaded into the skips and which the defendant afterwards, at its own expense, caused to be removed and loaded into skips, and that the work of removing and loading into said skips by them was so negligently and improperly done that the defendant suffered great damage thereby, to wit, a damage of five thousand dollars.

That while the said ore was removed by what may be called or termed a caving system, yet it was not by the caving system generally known and practiced in good mining and as intended in said contract, and that the ore removed did not amount to seventy-five per cent. of the merchantable iron ore contained on or above the first level, nor was said level or mine so worked and the ore so taken out and removed as not to interfere with future workings and developments of said mine; on the contrary, the said plaintiffs, in mining and removing said ore by the caving system practiced by them, allowed a very large quantity of dirt and debris and foreign matter to cave in, making said mining unprofitable, causing damage to the mine and interfering with its future working and development, and the ore so taken on or above said first level did not amount to or rate at seventy-five per cent. of the merchantable iron ore contained therein, but was of much inferior grade, whereby the said defendant suffered great damage, amounting to the sum of five thousand dollars.

40 And the said defendant will further give in evidence that said plaintiffs did not, as covenanted and agreed by them, work saidmine to its full capacity, nor did they remove the ore therefrom without unnecessary delay, nor did they mine from said first level or above the same an average of two hundred tons of merchantable iron ore per day, so that the amount removed each month should not be less than two hundred tons per day; on the contrary, the said plaintiffs removed a much less amount of ore and

removed the same in so unworkmanlike and unskillful a manner and of such a low grade of ore as to cause great damage to the said defendant.

And the said defendant will further give in evidence and insist upon that said plaintiffs did determine that the ore from the second and third levels of said mine could be removed and extracted by the caving system of mining, by the same process as mentioned in said contract for removing ore from the first level, and thereupon said plaintiffs proceeded to mine and take out ore from said second and third levels, but the ore so mined by them from said second and third levels was unskillfully and not in a workmanlike manner mined by them, and the grade of ore instead of being and containing fifty-eight per cent. of merchantable iron ore ready for shipment, was in fact of a much less grade and poorer quality than as agreed to be mined by said plaintiffs, by means of which the said defendant was damaged to a large amount, to wit, five thousand dollars.

And the defendant further will give in evidence and insist upon that the said plaintiffs did not mine the ore in said mine in or upon any of the levels mentioned in said contract in the quantities
41 per month or as fast as the same might have been done, but they delayed so to do and failed to furnish the quantities required by said contract in due season, to the great damage and injury of said defendant, by which the defendant suffered great loss, to wit, the sum of five thousand dollars.

That by the terms of said contract in writing the ore to be taken by said party of the first part, to wit, said plaintiffs, under said contract, was to be merchantable iron ore, containing at least fifty-six per cent. or upwards of metallic iron, and that no ore of a lower grade should be accepted or paid for by the party of the second part. That the said plaintiffs in fact entirely failed to fulfill their said contract in this respect, and that the merchantable iron ore mined by them and by them raised for shipment from the first level in said mine, did not contain fifty-six per cent. of metallic iron, but a very much lower grade of ore containing much less of metallic iron was actually mined by said plaintiffs, which said ore upon all and each of said levels so mined and raised was not accepted by said defendant as of the quality or kind specified in said contract, and is not, this defendant insists, liable to be paid for by it; nor did the said plaintiffs mine from the second and third levels or either of them, and place the same in skips ready for hoisting, ore containing at least fifty-eight per cent. of metallic iron as agreed to by them in their supplemental contract made with said defendant; on the contrary, the ore so mined and placed in skips from said second and third levels was of an inferior grade and did not
42 contain any such per cent. of metallic iron and was not accepted by said defendant as ore of the grade mentioned in said contract, of all of which said plaintiffs then and there had notice, and by means of which said defendant was greatly damaged, to wit, in the sum of five thousand dollars.

And this defendant will further give in evidence and insist that said plaintiffs did not take out all the ore which could possibly be taken out under the caving system of mining, but on the contrary, unnecessarily left large quantities of ore not mined and placed in the skips of the grade and yielding the percentage of metallic iron as specified in said contract between said parties, and that the amount taken out by said plaintiffs was much less than seventy-five per cent. of the ore contained in said levels, and that said plaintiffs entirely failed to perform their said cont act in this regard, by which said defendant has sustained great damage, to wit, five thousand dollars.

And the said defendant will further give in evidence that said plaintiffs did not properly conduct the work of mining said ore and did not mine the same so as not to injure the future business of mining in said mine; but on the contrary, mined such ore in so unsafe, unskillful and unworkmanlike a manner that said defendant was put to great expense in and about repairing said mine and making it safe and practical for future mining, to his damage two thousand dollars.

And said defendant will further insist upon and give in evidence upon said trial that said plaintiffs utterly failed to keep and perform their said contract according to its true intent and meaning, and that they entirely failed to mine and put into skips the kind and
43 quality of ore required by said contract, to conduct the business of mining in the manner in said contract specified, to do the same seasonable at the amount per month as required by them; but on the contrary, they utterly failed to perform their said contract in all these respects, by means whereof the defendant has suffered great damage and been put to great expense in and about said mine and in employing labor to do the things undertaken and agreed to be done by said plaintiffs to repair and put in good condition said mine after said plaintiffs had abandoned the same, and has suffered great loss on account of contracts which had been entered into by it with vessels and vessel owners to transport the ore to Lake Erie ports, but which were not able to be fully performed by it by reason of the negligence and carelessness of said plaintiffs and their neglect and refusal to comply with their said contract.

And will further give in evidence and insist that said plaintiffs, without hindrance or delay on the part of said defendant, voluntarily and without just cause abandoned their said contract and the business of mining as agreed to be carried on by them, and that the defendant was obliged at great expense to procure the same work to be done by others and suffered great loss by reason of the non-performance of said contract by plaintiffs and was greatly delayed and hindered and the mine itself was greatly injured and damaged.

By reason whereof the said defendant hath been greatly injured and sustained damage to a large amount, to wit, the sum of sixty thousand dollars, which said damages, or so much thereof as will be sufficient, the said defendant will claim by way of recoupment

44 against the demand of said plaintiffs, to be proved on said trial, and have the balance thereof certified in its favor.

Yours, &c.,

M. M. RILEY,
Defendant's Attorney.

Endorsed: Circuit court U. S. western district of Michigan, northern division. The Anvil Mining Company, &c., *ads.* John Humble *et al.* Plea and notice. Filed June 11th, 1889. F. M. Moore, dep. clerk.

45 [Endorsed:] Circuit court U. S., western district of Mich., northern division. The Anvil Mining Company *ads.* John Humble *et al.* Plea and notice.

46 In the District Court of the United States for the Western District of Michigan, Northern Division.

JOHN HUMBLE, JOSEPH H. JOHNS, AND JAMES JOHNS, Copartners, doing business as Johns Brothers and Humble, Plaintiffs,
vs.
THE ANVIL MINING COMPANY, a Foreign Corporation, Defendant.

GENTLEMEN: Please take notice that the following are the particulars of the defendant's set-off and recoupment, of which notice has been given by said defendant in this cause, viz.:

Loss and damages suffered by defendant on charter of schooner George W. Morley, loaded Sept. 28, 1888, through the acts of the plaintiffs in failing and neglecting to *to* mine and furnish ore to load said schooner, in accordance with the terms of their contract with defendant, 1,207 tons ore, at $1.80 per ton, loss 55 cts. per ton.....	$663 85
Loss on charter of boat T. D. Erwin, loaded Oct. 22d, 1888, through acts of the plaintiff in failing and neglecting to mine and furnish ore to load said boat in accordance with the terms of their contract with defendant, 500 tons of ore, at $1.70, loss 45 cts. per ton..	225 00
Amount paid Ashland Iron and Steel Company, Ashland, Wis., for deficiency in grade and quality of ore mined and furnished by plaintiffs below the grade and quality specified in their contract	176 38
Loss suffered by defendant on 10,000 tons of ore removed from above first level by the defendants after plaintiffs abandoned their contract at an expense of $1.10 per ton, which should have been removed by plaintiffs at 60 cts per ton., loss 50 cts. per ton.....	5,000 00
Loss and damages suffered by defendant by reason of the failure of the plaintiffs to extract mine and remove 75 per cent. of the merchantable iron ore above the first level in said mine as provided in their contract	5,000 00

Loss and damages suffered by defendant by reason of the neglect and failure of the plaintiffs to so work said mine and extract the ore therefrom in such manner as not to interfere with the working and future development of said mine, as provided by the terms and conditions of their contract with the defendant $5,000 00

Loss and damages suffered by said defendant by reason of plaintiffs having, contrary to the terms of their contract with the defendant in mining and removing said ore, allowed a very large quantity of earth, debris, and foreign matter to cave in upon and
47 become mixed with said iron ore, thereby making the mining thereof unprofitable..... ..... 5,000 00

Loss and damages suffered by defendant by reason of 10,000 tons of iron ore becoming mixed with earth, rock, and foreign matter through the carelessness and negligence of the plaintiffs, and being thereby rendered unsaleable..... ..... 10,000 00

Loss and damages suffered by defendant by reason of the failure of plaintiffs to remove and mine an average of at least 200 tons of ore per day, as provided for by the terms of their contract with defendant..... 5,000 00

Loss and damages suffered by defendant by reason of the grade and quality of iron ore mined by said plaintiffs from above the first level of said mine, being below the grade and quality specified to be mined under their contract with defendant..... ..... 1,000 00

Loss and damages suffered by defendant by reason of the plaintiffs failing and neglecting to mine and extract iron ore from said mine as fast as the same could be mined, and in failing, neglecting, and refusing to mine and furnish the quantity of ore required to be mined and furnished under said contract..... 5,000 00

Loss and damages suffered by def't by reason of plaintiffs' failure to mine and furnish iron ore of the grade and quality specified and mentioned in their contract with the defendant..... ..... 5,000 00

Loss and damages suffered by defendant by reason of the failure of the plaintiffs to mine and remove from said mine and levels all the merchantable iron ore that could have been removed therefrom by the caving system of mining, and by reason of plaintiffs' failure to mine, extract, and remove at least 75 per cent. thereof..... ..... 5,000 00

Expenses paid and moneys and labors expended by said defendant in repairing said mine and making the same safe and practicable for future mining operations..... ..... 5,000 00

Loss and damages suffered by the defendant through

the acts of plaintiffs in abandoning their contract with said defendant, and in wholly neglecting and refusing to comply with and carry out *out* the same... $5,000 00

Loss suffered by defendant through the acts of the said plaintiffs in negligently and carelessly destroying two tram cars of defendant..... 100 00

Dated June 26th, 1889.

M. M. RILEY,
Att'y for Def't.
J. G. FLANDERS,
Of Counsel.

To Kutts & Wilson, att'y for pl'ffs.

48 STATE OF MICHIGAN, } *ss:*
County of Gogebic, }

M. M. Riley, being duly sworn, says that he did, on June 26th, 1889, serve a true copy of the within bill of particulars on Kutts and Wilson, attorneys for the plaintiffs, by delivering the same personally to Frank F. Kutts at the city of Bessemer in said county.

M. M. RILEY.

Sworn to and subscribed this 27th day of June, A. D. 1889.

CHARLES F. BUTTON,
Notary Public, Gogebic County.

U. S. Circuit Court, Western District of Michigan.

JOHN HUMBLE *et. al.* }
vs.
THE ANVIL MINING COMPANY. }

Defendant's Bill of Set-off and Proof of Service of Same.

Filed June 28th, 1889.

F. M. MOORE,
Deputy Clerk.
M. M. RILEY,
Attorney for Defendant.

49 [Endorsed]: U. S. dist. court, west. dist. of Mich., N. Div'n. Humble Bros. & Johns *vs.* Anvil M'n'g Co. Bill of particulars of def'ts set-off.

50 UNITED STATES OF AMERICA.

The Circuit Court of the United States for the Sixth Circuit and Western District of Michigan. Northern Division thereof.

JOSEPH H. JOHNS, JAMES JOHNS and JOHN HUMBLE, Pl'ffs, }
vs
THE ANVIL MINING COMPANY, Def't. }

WESTERN DISTRICT OF MICHIGAN, *ss:*

James Johns, of Ironwood, Gogebic county, Michigan, being duly sworn, deposes and says that he is one of the plaintiffs above named

and brother of the above-named Joseph H. Johns. That the above-named plaintiffs composed the firm of Johns Bros. & Humble, and that the above-named Joseph H. Johns died at the town of Ironwood aforesaid on the 25th day of July, A. D. 1889, and was buried in Negaunee, Marquette county, Michigan, on Sunday, the 28th day of July last; and further deponent says not.

JAMES JOHNS.

Subscribed and sworn to before me this 11th day of September, 1889.

F. M. MOORE,
Dep. Clerk, U. S. Circuit Court.

Endorsed: U. S. circuit court for the western district of Michigan. Johns Bros. and Humble *vs.* The Anvil Mining Company. Affidavit of James Johns showing death of J. H. Johns. Filed Sept. 11th, 1889. F. M. Moore, dep. clerk. Kutts & Wilson, att'ys for pl'ffs.

51 United States of America, September term, A. D. 1889.

At a session of the circuit court of the United States for the sixth circuit and western district of Michigan, northern division, continued and held at the United States court rooms in the city of Marquette, in said district and division, on Wednesday, the 11th day of September, one thousand eight hundred and eighty nine, and of the independence of the United States the one hundred fourteenth—

Present Hon. H. F. Severens, U. S. district judge.

September term, A. D. 1889.

WEDNESDAY, SEPTEMBER 11TH, 1889.

Court met pursuant to adjournment.

Present: Hon. Henry F. Severens, U. S. district judge.

JOHN HUMBLE, JOSEPH H. JOHNS AND JAMES JOHNS,
vs.
THE ANVIL MINING COMPANY. } No. 280.

In this cause, on reading and filing affidavit showing the death of Joseph H. Johns, one of the plaintiffs herein, and on motion of Kutts and Wilson, attorneys for said plaintiffs, it is ordered that the suggestion of the death of Joseph H. Johns, one of the plaintiffs herein, be and the same is hereby entered, and it is further ordered that said cause do proceed in the name of John Humble and James Johns, surviving partners of John Humble, Joseph H. Johns and James Johns.

52 JOHN HUMBLE and JAMES JOHNS, surviving partners of John Humble, Joseph H. Johns and James Johns,
vs.
THE ANVIL MINING COMPANY.

The parties in this cause being in court with their respective attorneys and ready for trial, thereupon came a jury, to wit:

T. Stevens, George W. Greene, James Freeman, R. A. Parker, H.

Wellman, Ole Lumbard, A. Roehm, John Razor, Peter Ruppe, Jr., Andrew Foley, John Moe & Judson P. North.

And thereupon, on application and by consent of parties in this cause, it is ordered that Ben O. Pearl be and is hereby appointed reporter in this cause and that a transcript of his stenographic notes shall constitute the official record in this case, said jury being good and lawful men, and having been duly empanelled, tried and sworn well and truly to try the issue between the parties, sat together and heard the evidence this day adduced.

The court adjourned to Sept. 12th.

53 Sept. Term, A. D. 1889.

THURSDAY, *Sept. 12th, 1889.*

Court met pursuant to adjournment.

Present: Hon. Henry F. Severens, U. S. dist. judge.

JOHN HUMBLE and JAMES JOHNS, surviving partners of John Humble, Joseph H. Johns, and James Johns,
vs.
ANVIL MINING COMPANY.

The jury, heretofore duly empanelled, tried and sworn in this cause, sat together and heard the evidence this day adduced.

The court adjourned to Sept. 13th.

Sept. Term, A. D. 1889.

FRIDAY, *Sept. 13th, 1889.*

Court met pursuant to adjournment.

Present: Hon. Henry F. Severens, U. S. district judge.

JOHN HUMBLE and JAMES JOHNS, surviving partners of John Humble, Joseph H. Johns, and James Johns,
vs.
THE ANVIL MINING COMPANY.

The jury, heretofore duly empanelled, tried and sworn well and truly to try the issue between the parties, sat together and heard the evidence this day adduced.

Court adjourned to Sept. 14th, 1889.

54 September Term, A. D. 1889.

SATURDAY, *Sept. 14th, 1889.*

Court met pursuant to adjournment.

Present: Hon. Henry F. Severens, U. S. dist. judge.

JOHN HUMBLE and JAMES JOHNS, surviving partners of John Humble, Joseph H. Johns, and James Johns,
vs.
THE ANVIL MINING COMPANY.

The jury, heretofore duly empanelled, tried and sworn in this cause, sat together and heard the conclusion of the evidence and the arguments of counsel in part.

The court adjourned to Monday, Sept. 16th, 1889, at 10 a. m.

55 September Term, A. D. 1889.

MONDAY, *September 16th, 1889.*

Court met pursuant to adjournment.

Present: Hon. Henry F. Severens, U. S. district judge.

JOHN HUMBLE and JAMES JOHNS, surviving partners of John Humble, Joseph H. Johns, and James Johns,
vs.
THE ANVIL MINING COMPANY.

The jury heretofore duly empannelled, tried, and sworn in this cause sat together and heard the conclusion of the arguments of counsel and the charge of the court, and retired from the bar thereof in charge of Henry W. Reau, an officer of the court duly sworn for that purpose, to consider of their verdict to be given, and after being absent for a time returned into court and *and* say upon their oath that the said defendant did undertake and promise in manner and form as the said plaintiffs have in their said declaration in this cause alleged against it, and they assess the damages of the said plaintiffs on occasion of the premises, over and above their costs and charges by them about their suit in this behalf expended, at the sum of five thousand nine hundred forty-three & 79-100 dollars.

56 UNITED STATES OF AMERICA:

The Circuit Court for the Sixth Circuit and Western District of Michigan, Northern Division.

JAMES JOHNS and JOHN HUMBLE, surviving copartners, etc., Plaintiffs,
vs.
THE ANVIL MINING COMPANY, Defendant.

The plaintiffs respectfully request the court to require the jury to find specially upon the following questions of fact, viz.:

Do the jury find that through the fault or negligence of the plaintiffs the defendants were required to and did pay a greater sum for freight upon the ore mined than they otherwise would have done?

No.—. ANDREW FOLEY, *Foreman.*

If so, what damages do the jury assess therefor, and is it included in the general verdict?

No.—. ANDREW FOLEY, *Foreman.*

Endorsed: Humble *vs.* Anvil Co. Questions for jury to answer. Filed Sept. 16th, 1889. F. M. Moore, dep. clerk.

57 In the Circuit Court of the United States for the Northern Division of the Western District of Michigan.

JOHN HUMBLE and JAMES JOHNS
vs.
THE ANVIL MINING COMPANY.

Now comes the said defendant and moves the court to set aside

the verdict in this cause, and grant a new trial therein for the following reasons:

1. Said verdict was against the evidence.

2. There was no evidence upon which the jury were justified in finding that the defendant prevented the plaintiffs from performing their contract.

3. The court erred in allowing the jury to assess as damages loss of profits which the plaintiffs might have made on their contract.

This motion is founded upon the records of the cause and the evidence introduced therein.

Dated September 18th, 1889.

M. M. RILEY,
Attorney for Defendant.
BALL & HANSCOM,
Of Counsel.

Endorsed: Circuit court of the United States for the northern division of west. dist. of Michigan. John Humble and James Johns, *vs.* Anvil Mining Co. Motion for new trial. M. M. Riley, att'y for def't. Ball and Hanscom, of counsel. Filed Sept. 18th, 1889. F. M. Moore, dep. clerk.

58 The Circuit Court of the United States for the Northern Division of the Western District of Michigan.

JOHN HUMBLE and JAMES JOHNS, Plaintiffs,
vs.
ANVIL MINING COMPANY, Defendant.

WESTERN DISTRICT OF MICHIGAN,
State of Michigan,
County of Marquette.

Dan H. Ball, one of the attorneys for defendant, being duly sworn, says that after the rendition of the verdict in this cause he requested the stenographer who took the minutes of the trial to proceed at once to write out the minutes, in order to be able to prepare a bill of exceptions in the time fixed by the court, to wit, by the first day of January, 1890; but such stenographer has been, as he informs this deponent, so driven with other business that he has not as yet been able to complete it, and deponent has not as yet been able to commence the preparation of said bill of exceptions.

No judgment has been taken in said case, and an extension of time for settling a bill of exceptions, if such extension is necessary, until such time as judgment can be entered, will not in any way delay the collection of said judgment or the removal of said cause to the supreme court by writ of error.

Deponent therefore applies, in behalf of said defendant, for an order extending the time for settling such bill of exceptions until the first day of April next.

DAN H. BALL.

Subscribed and sworn to before me this 21st day of December, A. D. 1889.

RICHARD BLAKE,
Notary Public in and for Marquette County, Michigan.

Endorsed: Affidavit for order extending time for settling bill of ex. Filed Dec. 26th, 1889. F. M. Moore, dep. clerk.

59 The Circuit Court of the United States for the Northern Division of the Western District of Michigan.

JOHN HUMBLE and JAMES JOHNS, Plaintiffs,
vs.
ANVIL MINING COMPANY, Defendants.

On the application of defendant's counsel, it is hereby ordered that the time allowed for settlement of bill of exceptions in the above-entitled cause be, and the same is hereby, extended until the first day of April, A. D. 1890.

Dated December 24th, A. D. 1889.
At chambers.

H. F. SEVERENS,
District Judge.

Endorsed: Circuit court of United States for northern division of the western district of Michigan. John Humble *et al. vs.* Anvil Mining Company. Order extending time to settle bill of exceptions. Filed Dec. 26th, 1889. F. M. Moore, dep. clerk. M. M. Riley, att'y for deft. Ball and Hanscom, of counsel.

60 UNITED STATES OF AMERICA:

May Term, A. D. 1890.

At a session of the United States circuit court for the sixth circuit and western district of Michigan, northern division, began and held at the United States court rooms at the city of Marquette, in said district and division, on Tuesday, the sixth day of May, A. D. one thousand eight hundred and ninety, and of the independence of the United States the one hundred and fourteenth—

Present: Hon. Henry F. Severens, district judge.

JOHN HUMBLE and JAMES JOHNS, surviving partners of John Humble, Joseph H. Johns and James Johns,
vs.
THE ANVIL MINING COMPANY.

The jury by whom the issue joined in this case was tried, having, on the 16th day of September, A. D. 1889, rendered a verdict therein in favor of the plaintiffs and against the defendant, and having assessed the damages of the said plaintiffs on occasion of the premises at the sum of five thousand nine hundred forty-three dollars and seventy-nine cents, over and above their costs and charges by them about their suit in that behalf expended; therefore it is considered that the said plaintiffs do recover against the said defendant their damages by the jurors aforesaid, in form afore-

said assessed, together with interest from the date of the rendition of said verdict, amounting to the sum of two hundred twenty-seven dollars and eighty-two cents, together with their costs and charges aforesaid to be taxed, and that said plaintiffs have execution thereof; and it is ordered that the motion for a new trial, heretofore entered in this cause, be heard on the first day of the adjourned term of this court next ensuing, and it is further ordered that time to settle bill of exceptions in this cause be, and hereby is, extended until the first day of said adjourned term, and that
61 all proceedings be stayed until the determination of the motion for a new trial.

Court adjourned to May 7th, 1890, 10 a. m.

UNITED STATES OF AMERICA:

September Term, A. D. 1890.

At an adjourned session of the circuit court of the United States for the sixth circuit and western district of Michigan, northern division, continued and held at the United States court rooms in the city of Marquette, in said district and division, on Wednesday, the twenty-fourth day of September, A. D. one thousand eight hundred and ninety, and of the year of independence the one hundred fifteenth—

Present: Hon. Henry F. Severens, dist. judge.

UNITED STATES OF AMERICA:

September Term, A. D. 1890.

Court met pursuant to adjournment, Wednesday, Sept. 24th, 1890.
Present: Hon. Henry F. Severens, dist. judge.

JOHN HUMBLE and JAMES JOHNS, Surviving Partners of John Humble, Joseph H. Johns and James Johns,
vs.
THE ANVIL MINING COMPANY.

A motion for a new trial of this cause having heretofore been made therein on the part of the defendant, and the same having been argued and submitted, and mature deliberation thereupon had, it is ordered by the court now here that said motion be and the same is hereby denied.

The court adjourned until Thursday, Sept. 25th, 10 a. m.

62 UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Sixth Circuit and Western District of Michigan, Northern Division.

JOHN HUMBLE and JAMES JOHNS, Plaintiffs,
vs.
ANVIL MINING COMPANY, Defendant.

At a session of said court, held at the court room of said court, in the city of Marquette, in said district, on the 11th day of Septem-

ber, A. D. 1889, before the Honorable Henry F. Severens, judge of said court, the issue joined between the parties to this cause came on to be tried by a jury of said district, for that purpose duly impaneled, at which day came the said plaintiffs and the said defendant, by their respective attorneys, and the jurors of the jury aforesaid, who were then and there duly sworn to try the issue aforesaid.

And the said plaintiffs' counsel, to maintain and prove the issue on the part of the plaintiffs, introduced in evidence a certain contract in writing, the execution of which was admitted by both parties, which was as follows:

"This agreement, made and concluded by and between John Humble, Joseph H. Johns and James Johns, all of the township of Bessemer, in the county of Gogebic, in the State of Michigan, party of the first part, and the Anvil Mining Company, a body politic and corporate, party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the covenants hereinafter contained, and on the part of the second party to be kept, paid and performed, have covenanted and
63 agreed, and do hereby covenant and agree to and with the party of the second part, its successors and assigns, that they, the said party of the first part, shall and will, in a good and workmanlike manner, and at their own proper charge and expense, mine, remove and load into the skips all the merchantable iron ore contained on or above the first level of the mine now owned and worked by the said Anvil Mining Company at its No. 1 shaft, in said township of Bessemer. The said ore shall be mined and removed by what is known as the caving system, and the ore removed shall be at least seventy five per cent. (75 per cent.) of the merchantable iron ore contained on or above said first level, and shall be worked, taken out and removed in such manner as not to interfere with the future workings and development of said mine.

Said party of the first part shall work said mine to its full capacity, and remove the ore therefrom without unnecessary delay, and shall mine from said level at least two hundred (200) tons of merchantable iron ore per day; that is, the average amount of ore removed each month shall not be less than two hundred (200) tons per day.

It is understood and agreed between the parties hereto that should it be determined by said second party that the ore from the second and third levels of said mine can be removed and extracted by the caving system of mining, or by the same system practiced in removing the ore from the said first level, that this contract, at the option of said second party, shall extend to and include the ore contained on and above the second and third levels of said mine.

It is also agreed that it shall be entirely optional with said party of the second part to extend this contract to the ore below the second level, and that the said party of the second part shall have
64 the right of terminating this contract and the said system of mining at any time when said second party shall decide that said system is prejudicial to the future welfare and development of

said mine; equitable compensation to be made said party of the first part for damage suffered by them by reason of the said party of the second part so terminating this contract, and should said parties be unable to agree upon the basis of settlement, then the matter shall be left to two disinterested mining superintendents, one to be chosen by the party of the first part and the other to be chosen by the party of the second part, and in case said referees fail to agree, they shall choose a third, and the decision of said referees, or the majority of them, shall be final and conclusive upon the parties hereto as to the compensation to be made said party of the first part because of the termination of this contract.

The said party of the first part agrees that the said party of the second part shall have the use of number one shaft for the purpose of raising either rock or ore from said mine, in the sinking of said shaft and developing said mine below the first level. This privilege to use number one shaft is to be considered to apply only to the removal of ore, rock or other material necessary to be taken out in sinking said shaft, and in drifting, cross-cutting and opening the lower levels.

The ore to be taken out by said party of the first part under this contract shall be merchantable iron ore, containing at least fifty-six (56) per cent. or upwards of metallic iron, and no ore of lower grade shall be accepted or paid for by the said party of the second part.

The said party of the first part are to mine said ore and place
65 the same in the skips at No. 1 shaft in said mine, ready for hoisting, the ore to be hoisted at the expense of the said party of the second part, who agree to furnish all necessary power to properly run the skip in said No. 1 shaft for the purpose of hoisting the ore mined and placed therein by the parties of the first part, but this covenant shall not deprive the party of the second part of the right to use said skip for the purposes and in the manner hereinbefore provided. In case of any accident to said machinery, said party of the second part shall not be liable for any damages sustained by said party of the first part caused by delay in replacing or repairing said machinery, provided the said party of the second part shall cause the same to be replaced or repaired with all reasonable diligence.

The said party of the first part are to take out all the ore which can possibly be taken out under the caving system of mining, and in no case shall the amount taken out be less than seventy-five (75) per cent. of the ore contained therein, as above agreed.

The party of the second part are to have the right or privilege of superintending and directing said work, and for that purpose to enter said mine and inspect the works thereof at any time, for the purpose of seeing that the work is properly conducted by the said first party, and that the work so done is not prejudicial to the future interest and working of said mine.

It is further expressly stipulated and agreed that the said party of the second part shall not, under any circumstances, be liable for any damage or injury to either person or property by reason of the

carelessness or negligence of the said party of the first part, or of the workmen, apprentices, or other persons in their employ, in the furtherance of this contract, and that the said party of the first part shall and will indemnify and forever save harmless
66 the said party of the second part from all actions, claims, suits and damages by reason thereof.

In consideration whereof the said party of the second part covenants and agrees to and with the said party of the first part to pay them, the said party of the first part, the sum of sixty (60) cents for each and every gross ton of merchantable iron ore mined and removed by the said party of the first part from the said mine under this contract, each gross ton to contain two thousand two hundred and forty (2,240) pounds avoirdupois.

The amount of ore shipped from said premises and the amount due said party of the first part therefor shall be determined by and based upon the weights as ascertained by the reports of the railroad company or companies made to said party of the second part of the shipment of ore from said mine, in case of the shipment of the ore so mined from said premises. In case the ore so mined is stock-piled, the said party of the first part to be paid seventy-five (75) per cent. of the amount coming to them for ore mined and placed in stock pile, the amount to be estimated and measured by the parties hereto, and in case the said parties fail to agree upon the number of tons of ore placed in stock pile aforesaid, then, in that case, the amount shall be estimated and determined by C. M. Boss, civil engineer, of Bessemer, Michigan, whose decision as to the number of tons in said stock pile shall be final and conclusive on the parties. And in case said Boss is absent or unable to act, then by some competent engineer to be agreed upon by the parties, and in case the parties cannot agree, then by the mining inspector of Gogebic county, Michigan, but such estimate may be corrected by either party by the reports of the shipments of ore upon shipment of the same.

67 The remaining twenty-five (25) per cent. of the ore so stock-piled to be paid said party of the first part as soon as same is shipped from the said mine.

And it is further understood and agreed that the ore mined and stock-piled during any season shall be shipped before the close of navigation in the season that the same is mined.

In case said party of the second part shall fail to ship the ore so stock-piled before the close of navigation, the said twenty-five (25) per cent. so retained shall be paid said party of the first part on or before the first day of December in each year.

It is further understood and agreed that the said party of the first part shall not be at liberty to assign this contract without the consent of the party of the second part in writing first had and obtained for that purpose; and in case of the assignment of this contract without the consent of said second party, the said second party shall be at liberty to declare this contract void and of no effect. And in that case the rights of the said first party hereunder shall cease and determine.

Payment shall be made by the party of the second part to said party of the first part on or before the twenty-fifth (25th) day of each and every month for the ore mined by the party of the first part under this contract during the month immediately preceding; that is to say, payment shall be made not later than the twenty-fifth (25th) day of June for all ore mined by said party of the first part during the month of May preceding, and so on each month

It is further understood and agreed between the parties hereto that all timbers saved by the party of the first part from the first level may be used by them without charge or cost in the mining of iron ore under this contract.

68 This contract shall bind the said party of the first part, their heirs, executors and administrators, and shall bind said party of the second part, its successors or assigns.

In witness whereof the said party of the first part have hereunto set their hands and seals, and the said party of the second part have caused these presents to be executed by its president and attested by its secretary, and its corporate seal to be hereunto attached, this 1st day of May, in the year of our Lord one thousand eight hundred and eighty-eight.

JOHN HUMBLE. [SEAL.]
JOSEPH H. JOHNS. [SEAL.]
JAMES JOHNS. [SEAL.]
[SEAL.] ANVIL MINING COMPANY,
M. H. BRAND, *President.*
G. E. TARBELL, *Secretary.*

In presence of
D. A. BENNETT.

It is mutually agreed by the parties to the within agreement, that this contract shall extend to and include the ore contained on and above the second and third levels, as named therein, with the exception that the merchantable iron ore extracted under this contract shall contain at least 58 per cent. (fifty-eight per cent.) or upwards of metallic iron.

In witness whereof we have hereunto set our hands and seals this 10th day of July, A. D. 1888.

Interlined before being signed.

JOS. H. JOHNS. [SEAL.]
JAMES JOHNS. [SEAL.]
JOHN HUMBLE. [SEAL.]
ANVIL MINING CO.,
D. A. BENNETT, *Supt.*

In presence of—
R. STEPAN.

69 John Humble, one of the plaintiffs, sworn in his own behalf, testified as follows:

The firm known as Johns Bros. & Humble consisted of James Johns, Joseph H. Johns and myself.

Plaintiffs' counsel asked the witness the following question:

"State, if you know, whether the firm of Johns Bros. & Co.

entered into a contract with the Anvil Company, with reference to the iron ore contained in the mine owned and occupied by them in that range for the Anvil Mining Company?"

Defendant's counsel objected to said question as incompetent. The court overruled said objection, to which ruling defendant's counsel excepted, and the witness answered: "We did."

He further testified:

The said Anvil mine is situated about a mile and a half east of Bessemer, in Gogebic county. The superintendent of said mine is Mr. D. A. Bennett. We entered upon the performance of the contract by the 7th day of May. On the 8th of May we put all our men in and worked up to the 11th before we shipped any ore. We didn't have any cars to put it in, and the result was we took none out. Before we took any ore out of the mine we had a shoot that was full of ore, that had broken, and we could do nothing until we could run this ore out of the shoot. By shipping ore I mean taking the ore out, putting it in the skip and sending it to the surface. The skip holds about two tons of ore, and is used to hoist ore or rock, and is run by machinery on an incline. When the skip reaches the surface it dumps the ore into a car or in a pocket. We commenced putting ore into the skip on the 11th or 12th of May. We commenced to mine the ore according to Mr. Bennett's instructions, and to cave the mine—a portion of it; and we run after
70 that until about the 16th or 17th, and were held two days waiting for cars by Mr. Bennett failing to take the ore away. He said he had no place to put it, and he wouldn't take any; that he had no cars to receive it from the pocket; that was the reason why they wouldn't work the skip. After that we worked on until the last day of May, and we didn't do anything that day. We had no cars and had seven cars loaded on top; and Mr. Bennett, one night after supper, dumped five of those cars down through the trestle and said it wasn't good for anything and he wouldn't ship it; and the next night my partner went to work, and he dumped two that night again. I came out the next morning to go to work. This was on the 1st of June, and Mr. Bennett told me he had lots of cars for me this morning. I asked him how many cars the engine took out. He said they didn't take out any; "we dumped it all down through the trestle." I went down to the trestle and saw the ore dumped there. Bennett told me we were working too near the surface—we had to stop. I went down, cleaned out what ore was in the shoots, sent it up, and moved my men in different positions in the mine to commence over again. I took a skip of ore that was dug, from the men, and sent it up. We had a pipe in the shaft that we could talk through, from bottom to top, and I asked from the top if that would do, and Mr. Bennett said no, that was no better than the other and there was no use sending it up. I took another skip of ore and sent it up, and asked if that was any better. He said: No, he wouldn't accept it; there was no use sending it up. I let my men work the half day out, and then we stopped at dinner time and stood there two or three days. I asked Mr. Bennett to go down and look at it,

and he said he would. When the time came he said he couldn't go down, but sent Mr. Floyd down with us. I went down with
71 Floyd and looked at all those places where my men had been working that morning, and we came up. Floyd went with me to Bennett's office, and told Mr. Bennett that all the places my men were working in that morning were good except one, and that was stopped.

Now those five cars that were dumped down—there were two standing out still on the trestle-work loaded, a little ahead of those, and he said he would let those go, and he said probably he could pass those cars all right with the rest, and would let them go out. After we commenced to work again and got some more out—got some cars loaded—he dumped those two cars down also; and I told him him we had better make an assay of this ore. We took the assay, and while it was away he commenced to haul those two cars away from the mine and put them to make a road into the mine. There were eleven cars all together dumped through the trestle-work running up to the skip. After the assay came back, of those eleven cars Mr. Bennett told me it assayed 58.70; so then he didn't haul any more of it on to the road.

In order to get information as to the amount of ore shipped, I had to go to the office and ask the bookkeeper, and he gave me 3,610 tons for the month of May. I asked the bookkeeper to give us the weigh bills so that we could copy them off. There was no one present but the bookkeeper when I made this application.

The witness was then proceeding without further interrogatory to state what the bookkeeper said to him in answer to his application. Defendant's counsel objected thereto as irrelevant and incompetent, but the court overruled said objection, and to said ruling defendant's counsel excepted.

The witness proceeded: He, the bookkeeper, told me Mr. Bennett's orders were to lock those weigh bills in the safe and
72 keep them and give us our account off the books. The next day I asked Mr. Bennett in the office, in the presence of the bookkeeper, to give us those weigh bills, and he said there was no need of it as long as they copied them off from the books; that was good enough for us.

During the month of May we had sometimes twenty, twenty-five, and up to thirty men employed.

Plaintiffs' counsel asked what quantity of ore were they capable of placing in the skip by reasonable effort and according to the common mode of work. Defendant's counsel objected to said question as incompetent and irrelevant. Said objection was overruled by the court, and to said ruling defendant's counsel excepted; and the witness answered: "We were able to hoist about 225 to 250 tons per day. We could mine and put in the skip that amount by ordinary work. The company itself did the hoisting."

Plaintiffs' counsel asked:

"Q. What reason can you give why you did not place in the skip the average of 200 tons a day?" Defendant's counsel objected to

said question as incompetent, and that it called for the conclusion of the witness instead of facts. Said objection was overruled by the court, and defendant's counsel excepted. Witness answered: "Well, the superintendent in the month of May didn't interfere with us as regards hoisting the ore much, only he hadn't cars and no place to put it."

"Q. State whether or not the men lay idle during the month of May from want of cars?" Defendant's counsel objected to said question as leading and irrelevant. The court overruled said objection, to which defendant's counsel excepted, and the witness answered "Yes."

And the witness further answered: "They refused to take the ore up on account of having no cars; they wouldn't stock-pile
73 it; they didn't have any place to stock-pile it that I know of."

In the month of June we put in skips and sent up 5,155 tons during the month. We were delayed by Mr. Bennett refusing to take the ore up. He refused to take it, and dumped the ore on the ground, and told us it wasn't worth anything and he wouldn't ship it. That was the ore that I spoke of before as being dumped through the trestle; those two cars that were out on the end of the trestle that was dumped last making 11. I went with Bennett to look at the ore. He said it wasn't very good but he could probably get it shoved in, and then he said: "This company don't calculate for you to make any more than $2.50 or $3 a day."

We commenced to work on the second level on the 25th of June. Mr. Bennett ordered us to commence to work on that level and to put a raise in front—that level up to the first level; that is, a road driven up on an incline to strike the other level in order to bring the water down from the first level to the second level and dry this body of ore in the second level. We commenced it on the 25th of June and completed it on the 29th. It took two men from our business to do that work. During the month of June there were orders given repeatedly, with reference to sending up ore from the first level, but every time we would cave a place he would stop us from sending the ore out the minute we had it broke—wouldn't let us ship it out. He detained us that way in the month of June, sometimes a day and sometimes a half a day, about four or five times.

The process of caving is to take a portion of ground, cut it up into blocks, leave small pillars, then drill a hole in each of those pillars, charge it with an explosive and blow it all out and let the ore come right down towards you. After we had cut up our
74 ground we would put a shoot in below where we were going to cave, and when we would take out those pillars we would run this ore through that shoot, and if the dirt come we would close that shoot and leave it, but we were made to leave the ore behind that shoot; were not allowed to run it at all; the ore was left in there every time we caved it, and I think we caved it five or six times, once in May, during the months of May and June. The last cave we made in the same cross-cut was on the 29th of June. This

was in the first level, and this ore had all been left back behind that we had caved previous to this.

In the month of July we put in skips—2,263 tons.

"Q. Now explain why you did not put into the skip the full quantity required in that month? A. After I was stopped in the first level, made the last cave, we run some ore from there, but it didn't amount to a great deal; he wouldn't allow us to run it; kept stopping us, and then I was stopped from the 1st of July up to the 8th of July, and couldn't commence in the second level; after I had already commenced to put this raise up in the second level I couldn't go in to open out a body of ore, and Mr. Bennett didn't or wouldn't open it out, and so we had to go down and commence in it and we waited until the 8th of July; our men were lying around and we had to put them in the first level to take out a little ore, and we had to keep them laying idle and had to pay them; after we commenced on the 8th of July to open out this second level, then on the 12th of July Mr. Bennett had been asking me several times to raise the grade of this ore to 58, and I told him I wouldn't do it; so on the 12th of July he came into the engine house where I was sitting and said: Aren't you going to raise the grade of that ore, and I said, no, sir; he told the engineer: you run that skip no more to the second level; then we stopped until about the 17th of July before we did any more."

On that day I received a communication from Mr. Bennett. Said letter was produced and offered in evidence and was as follows:

"ANVIL MINING COMPANY,

"BESSEMER, MICH., *July 12th, 1888.*

"To Messrs. JOHNS BROS. & HUMBLE:

"GENTLEMEN: Under your contract of May 1, 1888, with the Anvil Mining Co. for the extraction of ore from their mine, it is optional with the co. to extend your contract to include the second level or even the third. The co. are willing to so extend the contract as to include the second level upon a slight modification, viz., in the grade of ore to be extracted. The co. desire that the grade of ore shall not fall below 58 per cent. metallic iron for all ores taken from second level. Until you have formally assented to this modification you will please perform no work on second level, and unless you notify the co. of such assent within reasonable time your contract will terminate with the first level.

"Yours truly, D. A. BENNETT, *Supt.*"

After the 17th, or before the 17th, Mr. Bennett went to Milwaukee. Before he started he wanted me to say I would alter this contract and raise the grade so that he could inform the company that we had done so, and I wouldn't do it. I made a proposition to him that if he would extend the contract to the second and third levels I would do it. He wouldn't do that until after he came back from Milwaukee, and then he agreed to extend it to the second and third levels. That agreement is written at the end of the contract offered

in evidence. It was actually made about the 23d of July.
76 I don't know how it came to be dated the 10th. It was executed some time after Mr. Bennett came back from Milwaukee.

The reason why we didn't put into the skip 200 tons per day during the month of July was, we had to open out the work under Mr. Bennett's directions.

In the month of August we put into the skip and sent up 1,885 tons. The reason why we didn't send up 200 tons per day in August was, that after the ore was partly got out of the second level Mr. Bennett stopped us from opening it all out. He allowed us to open out the inside lens 27 feet square, three sets each way, and the sets would take about nine feet, and after we got them opened out that was all we had to cave; he wouldn't allow us to go east or west, or north; he said the ore was good for nothing and he wouldn't take it out. I couldn't tell what the quality of that ore was, only he told us our cargoes of ore were going all right—it was going 59 or 60. The ore taken from the cross-cuts and drift was shipped; there was no difference between the ore taken from the drift and cross-cuts and the remainder of the ore which was refused, that I could see. There was ore of like quality left in that level which we were forbidden to take out.

The witness was asked as to the dimensions of the lenses of ore in said mine, and testified: I measured the lens in the first level and think it was somewhere between 140 and 146 feet in length and 60 feet in width; I think it was about 90 feet high. The second level was 72 feet wide, but as to the length of it we were not allowed to open it out; we were only allowed to open 27 feet of it and then we stopped; the height is 40 feet. The floor between the first two levels—first and second—was ore of the same character
77 that we had taken out. The third level was 72 feet across and 146 feet long and 40 feet high. The character of the wall beyond our 27 feet extension in the second level was the same as the balance, and it was ore and a little mixed, just the same as we were taking out. We took out 1,885 tons in the month of August.

Q. What reason can you give to the jury why you did not take out the full amount of 200 tons per day in the month of August?

A. On the latter part of July, about the 23d or 24th, the third level wanted to be opened out. We had no place to put our men; the second level was about exhausted; they were about to stop it, and Mr. Bennett told us to go down into the third level and put our men to work to open that level out and he would pay the expenses of our men. We commenced in July, and we were working for the company there up until about the 24th or 25th of August, but we couldn't get any ore at all.

Q. Why didn't you take ore from the first level?

A. We were not allowed to.

Q. Who prevented you from taking it?

A. Mr. Bennett.

In the month of September we sent up 1,873 tons; during this month we were cross-cutting for the company through this lens of rock and drifting after we got through in the ore, and making a pump-house—taking out a place in order to put the pump down into the third level—and the company paid all these expenses, except when we struck the ore they wouldn't pay us for cross-cutting or drifting; we had to do that ourselves. The ore obtained by cross-cutting and drifting in the third level was shipped.

I got the statements of the ore mined during those different months from the bookkeeper when we went to get our money that was due us for September and October.

Plaintiffs' counsel asked the witness in relation to said statement, "What was there as to the number of cars and number of tons?" to which defendant's counsel objected on the ground that the same was incompetent. The court overruled said objection and admitted said testimony, to which defendant's counsel excepted.

And the witness thereupon testified: The statement shows 98 cars, containing 1,885 tons, was shipped in August, and 128½ cars, containing 1,873 tons, was shipped in September, and when the bookkeeper learned that I was taking down the number of cars and shipments he refused to give me any number and said: "That is all you can have."

In the month of October we had caved the third level ready for loading, and about the 3rd of the month Mr. Bennett sent Captain John Rowe down and stopped us from shipping it. We
78 went up about eleven o'clock, and I met Mr. Bennett and said to him: "You have sent John Rowe down to stop us this morning." He says, "Yes, I have," and turned around and walked away to the office.

The next day I engaged Mr. Boss and Mr. Channing, the mine inspector, to go and take a sample of those places I was shipping ore from. I was shipping from the inside lens on the third level, and from the foot wall lens in the third level, and from the foot-wall lens in the first level. By the inside lens in the third level I mean the one next to the hanging wall; there is a belt of rock between the two lenses. Mr. Channing is the county mine inspector. They sampled the three places where I was shipping from. When they were taking samples, Mr. Bennett came to my partner and me in the mine and said to us: "Why did you stop yesterday?" I said, "Didn't you stop us?" He says, "No, sir." I said "You did." He said, "I didn't." "Well," I said, "John Rowe stopped us, and said it was your orders." He said, "I never told John Rowe to stop you." He said John Rowe had no business to do it, and when he wanted to stop us he would do it himself. Afterwards Rowe came down where Mr. Bennett, my partner and I were standing. I said: "John Rowe, who ordered you to stop us yesterday morning?" He answered, "Mr. Bennett." Bennett walked away and made no reply, but as he was going away he said, if he stopped us he didn't mean to.

Plaintiffs' counsel asked the witness as to the amount of profit ac-

cruing to the plaintiffs from mining and delivering into the skip the ore that they did mine, and proposed to show what profits were realized by them upon the ore so mined for the purpose of arriving at the profits they might have made in taking out the ore which they allege they had been prevented by the defendant from taking out.

79 Defendant's counsel objected to such proof on the ground that the same was irrelevant—

First. Because the defendant by the terms of the contract had the right at any time to terminate it, and the amount of profits that might have been made by taking out more ore, if there was any to be taken out, would not be the measure of damages.

Second. Because by the terms of the contract if the defendant should decide to terminate it the equitable damages to which the plaintiffs would be entitled were to be fixed and determined upon by arbitrators.

Third. Because profits, if any, derived from taking out the ore that was actually taken out would be no index or guide to the profits that might have been made in taking out the remainder of the ore.

Said objection was overruled by the court, to which ruling defendant's counsel excepted.

And the witness thereupon testified:

I made an estimate of the amount of profits accruing to us from the mining and delivering of this ore into the skip. I took the amount of money that was received for the first month, when we were not interfered with or delayed, only waiting for cars, and divided it up amongst the men that were working, and the amount of ore put out, and what they put out each day, and what the cost was for that amount for the month.

"Q. Do you know what would be the fair cost of getting out the ore that you did get out? A. About 30 cents per ton for getting out the ore I did take out. It would cost less to take out the ore that remained in the mine than that which we took out."

80 Witness then testified in detail to the amount of time lost by his employés by reason of being prevented from taking out ore from the mine for want of cars to load.

Witness further testified:

Some time after the 12th of July and before the signing of the new contract we had an interview, myself and partners, with Mr. Bennett, the superintendent, about the making of the new contract and making the ore 58 per cent. I asked Mr. Bennett why he wanted to make another contract to make the grade 58 per cent. when he already said our ore was going 59 and 60, and he said "I want that done just to make you boys a little careful." I answered: "Have we not been careful enough when our grade is going 59 and 60 and our contract only calls for 56?" He said: "You will have to do it before you can work any more."

Witness further testified that, upon the measurements he made of the ore body in the several levels, he had estimated the number of

tons in the first level at 87,600; that he estimated the value of that at 30 cents, amounting to $26,180. He also estimated the amount of ore in the second level at 46,720 tons, and that he estimated it at 30 cents profit, amounting to $14,016; that the amount of ore estimated by him in the third level was 46,720 tons, which, at 30 cents profit, would amount to $14,016; that the amount of ore actually taken out by the plaintiffs should be deducted from those amounts.

Upon cross-examination the witness testified as follows:

We commenced work on May 7 with, I think, three men, and on the 8th we had from 20 to 25 men. We did not put out any ore until the 11th, because we had no railroad cars; the company had no cars to take the ore in; they wouldn't take it up; they wouldn't stock it. I talked with Bennett about it on the 7th, 8th and 9th, and asked him what he was going to do with the ore, and he said I would have to wait for cars. I asked him to hoist the ore. He said he couldn't take it up until he got the cars in. I didn't put any ore in the skips or give any signals to hoist it. Bennett did not tell me that he would stock the ore if we insisted upon it. They refused to hoist the ore on the 7th, 8th and 9th of May, and also on the 10th.

Shaft No. 1 was sunk upon the foot-wall, dipping towards the north; that next to the shaft was a narrow belt of ore running east and west. Next north of this belt of ore was a belt of rock about 40 feet in width, through which there was a cross-cut at the time the plaintiffs commenced work. Next beyond the cross-cut was a belt of ore about 60 feet in width, which the witness called the inside lens. This was at the first level. At the time plaintiffs
81 commenced, there had been taken out from this inside lens a body of ore about 27 feet in height and about four or five sets in length and the same in width. That these sets were timbers set up to support the ground, consisting of two posts and a cap, then two other posts and caps nine feet distant therefrom, so that each set was nine feet square and nine feet high. That, in mining, the plaintiffs would open out rooms, leaving small pillars, and then blast out the pillars and let the ore come down; that they put no timbers in to support the ground.

The witness:

I blowed out the pillars, blasted the pillars out and let the ore down.

Q. So it came down from above? A. No, sir.

Q. It did come down at some time, the ore and dirt and sand and gravel, from above, came down into the mine? A. Yes.

Q. When was that? A. It came down. After I run a part of the ore out there, Mr. Bennett ordered me to close up the chute and leave it.

After he had run a part of the ore out Mr. Bennett ordered him to close the chute and leave it, told him not to take out any more of it because it was too poor; he wouldn't take it out. I afterwards put a man into the same cave to shovel the ore that was already caved, and he shoveled quite a lot of ore out, and that ore was all shipped; but they wouldn't allow me to run the chute.

He then opened out another room, blasted out the pillars so that the ore came down, and he took a part of that out, when he was stopped by Mr. Bennett, Bennett telling him it was too poor, and he wouldn't take it out. That on the 29th of June he made the last cave in the first level, which brought down the whole surface into the mine. The ore came down.

Q. Was there any sand that came down there, too? A. There was sand in the ore.

Q. The sand came from the surface above the ore? A. No, sir, not at all; I didn't see any.

The cave filled up the timbers and broke down a part of the room. The plaintiffs were then going to take it out and send it up, but Mr. Bennett stopped them. After that they blasted out the timbers and let the ore come down to them. That this brought down the ore, but nothing else. That they did not get the surface and sand and gravel down into the mine and mixed up with the ore. That after this there was room for only two men to work to take out any ore. That they were not then quite through in the first level taking out the ore that they were allowed to take out. That they had two or three men filling in a little ore that they were allowed to take. That after they made the last cave in the first level the defendant wouldn't let them run the chutes, but said the ore was good for nothing, and stopped them; but Mr. Floyd thought there was lots of ore inside over the tops of the timbers, and that it should be taken out. That the only way to get that ore out was to blast out that set of timbers and let that ore down, and that plaintiffs did it, and then, after plaintiffs had let that ore down, that was not considered good by the defendant and was stopped.

That on the 25th of June Mr. Bennett requested him to send some men down to make a raise from the second level to the first; that they had finished the work in the first level, and that they couldn't get to the other work in the second level. He sent two men down to make the raise. That on the 8th day of July Mr. Ben-
82 nett ordered plaintiffs to commence and open out the second level, and they put on six men. They worked until the 12th and then were stopped by Mr. Bennett, who told the engineer to stop the skip going to the second level. They began again about the 17th of July, commenced mining in the same way, caving it out, as they had in the first level. That they drove raises in and blasted and caved it down, and caved it through from the first level. That a large amount of the dirt that had been caved into the first level came down into the second. That he caved next to the hanging wall and took the ore all out, and when the dirt came down he stopped, came farther back, caved it again, took the ore from that and th dirt came down, then caved it back again and took the ore from there till the dirt came down.

Q. You got the ore all out of the second level?

A. Pretty much all of it.

Q. So there wasn't much left?

A. All of the 27 feet; I got pretty much all that.

Q. I believe you don't claim there was any ore left in the second level of any account that you didn't take out?

A. Yes, sir; I do.

Q. I thought you said you took it about all out, practically.

A. I took all that I was allowed to take: I took the 27 feet that I was allowed to open, but I wasn't allowed to open out the extent of it.

We made 30 cents per ton profit on the ore we took out. What we got out wouldn't come out easier and with less expense than the other. That which would run down without any shoveling I was ordered to leave by Mr. Bennett. What I took out I had to pick. When I drove into the old cave and shoveled it out that ore went all right, but when I run the chute I was stopped; he wouldn't let me run the chutes at all; he would only let me load by shoveling. Bennett told me the ore that was in the chutes wasn't worth anything and he wouldn't hoist it up, and it was no use sending it up. He had Captain Floyd around watching, and he would tell Mr. Bennett when I was running the chutes and Bennett would send him down to order the chute stopped, and I had to stop.

I don't know how the ore that was left in the mine would assay; I didn't have any of it sampled. I know of some of it being sampled by Mr. Bennett telling me. I didn't have the ore sampled that was left in the second level; do not know what the grade of it was. I had the ore sampled in the third level by Mr. Boss and Mr. Channing; that assayed 56.13 per cent., or that is what the assayist's card said. The foot-wall lens went over that; that was about five or six feet in width.

We quit work finally in the mine the 11th of October.

I remember the inspector of mines being there to see what kind of work we were doing. The mining inspector wrote a letter to Mr. Bennett, giving directions as to the timbering, a copy of which Mr. Bennett sent to me with a letter of his own.

83 Witness produced Bennett's letter and the copy of the mining inspector's letter, which were introduced in evidence, and were as follows:

"ANVIL MINING COMPANY,
BESSEMER, MICH., *Oct. 6th, 1888.*

To Messrs. Johns Bros. & Humble, Contractors Anvil Mine.

GENTLEMEN: I enclose a copy of letter rec'd from Mr. J. Parke Channing, inspector of mines, in which he directs certain work to be done that should be performed by you as contractors, the most important being the labor necessary to the protection of the shaft, which he says is unprotected, and seems to intimate that it needs the support which it would have by filling the room from which you have stop-ed the ore in the first level. Our company are still waiting for you to resume work, which was abandoned recently without apparent cause. There is yet a large amount of ore in the levels, included in your contract, of merchantable grade, and that would come within the stipulated grade named in your contract,

viz., 58 per cent. iron. Our company would at least like to have you take out the ore named by Mr. Channing in the room near the shaft in the first level in order that we may take the necessary measures to protect the shaft pillar, as suggested by him. If this work is not done at once, our company will be forced to the conclusion that you do not care to continue your contract, and the company will do it, or have it done, as directed by the inspector.

Please advise me at once of your intention, or rather when we can expect you to resume this work.

Yours truly, D. A. BENNETT,
Sup't Anvil Mining Co."

"OFFICE OF INSPECTOR OF MINES,
Gogebic County, Michigan.
BESSEMER, MICH., *Oct. 4, 1888.*

D. A. Bennett, Esq., Sup't Anvil Mine, city.

DEAR SIR: You and your contractors are hereby notified not to break any more ground in the large room now open on the first level west of No. 1 shaft until the back of same room is made secure by timbers. You are to allow no men to enter said room unless for the purpose of putting in timber and trimming back down at the same time. Trammers may enter the timbered drift and mill down the ore to the cars, but before they enter the drift must be made secure at the mouth by blocking up the open space under the pillar and lagging it up tight. Remove the broken ore from the far end of the drift first, and then either timber up the place or abandon it.

I would most strongly advise that this place be filled from above with waste rock or sand, as it leaves your shaft-pillar in an unprotected condition.

You will please see that the cross-cuts from your shafts into the ore are blocked tightly and properly laced.

84 I will notify you that drifts larger than seven feet and untimbered will in every case be pronounced dangerous by me, as also rooms over nine feet square. Such large chambers as that above mentioned I consider unsafe for any man to work in.

I have no objection to your cutting your ore up by *small* drifts & cross-cuts, & then caving the honey-combed ground, but after the caving I object to men working in any large rooms.

Very truly, yours,
J. PARKE CHANNING, *I. of M.*"

Witness further testified:

The room which was ordered to be timbered up was on this narrow belt of ore in the first level. At that place we were getting a first quality of ore; we did nothing towards timbering up that place after that. After the inspector was there I didn't break any more ore there; I had stopped and was taking out the ore that was in the room—this room on the foot-wall—and it was about eight or nine feet square, and the pillar was left by order of the captain.

That pillar was to protect the shaft. We didn't touch it, and the rock from the west came on us and cut us out in a small place, and we timbered it through and cut it up and put in shoot-s on the timbers and let this ore come down on the timbers, and we only run enough of that ore out of there so it wouldn't accumulate too high for the men to stand on to break the ore above. At this time the ore was dropping down from the top. We were working in the rock; we had quit working there, and there was no ore then to get. There was broken ore in the room Mr. Channing speaks of, but there was no more ore in the lift, and we had abandoned the mining of it. After this letter was written I took out the ore that was broken. We were not working at the time this letter was given to us. Mr. Bennett had stopped us; he stopped us on the 3rd day of October—that is, the captain, Rowe, came down and told us to stop. He said that Mr. Bennett had directed that we shouldn't do any more work in the mine. He told me I was
85 to stop that morning, that that was Mr. Bennett's orders. I came up and saw Mr. Bennett just before dinner. The day after that Mr. Bennett told me that he didn't tell Rowe to stop us. The next day, on the 4th, when Mr. Boss and Mr. Channing went out to take a sample, Mr. Bennett seemed surprised at our stopping the day before. We then lay idle until the 9th; I was away getting an assay. I had four or five or six men there waiting to work. After Bennett told us that it was a mistake, that he had not stopped us, we set the men to work again on the 9th. We didn't go to work on the 4th or 5th because I wanted the assay to see what the ore run; Bennett claimed the ore was all low grade in the third level. I didn't set my men to work somewhere else until that could be assayed, because I was mixing the low-grade ore with the high grade to bring it up to the 58 per cent. standard, as Bennett had instructed me. He told us we could mix some of this low-grade ore with the high-grade ore so as to bring it up to 58 per cent. That was the reason why we didn't begin again, because we were waiting for the assay. We worked from the 9th to the 11th, and then Mr. Bennett stopped me again. We had worked half a day, and at dinner time my partner and I were going together to the dry-house and Mr. Bennett came to us and said: "You boys can stop in that third level altogether." "Well," says I, "you mean to bring our tools out?" "Yes," says he, "you can run what ore you have broken in the first level and quit." Then we went down and stopped the men in the lower level and commenced to run out what we had in the first level, and we sent out all the tools in the mine and left. We got out all the ore we had broken on the foot-wall lens; there was no more ore left there to break except the pillar.

86 On re-examination by plaintiffs' counsel, the witness testified that they had taken out from the mine in September 1,873 tons and in October 477 tons, for which they had not been paid; and that there was due for mining said ore $1,410. That the wages paid to men while idle, and plaintiff's own time and that

of his partners while idle, at $4 per day each, amounted to $726.83. That the condition of the mine after the caving wasn't the result of mismanagement in any way; that the result was the usual and expected one. That plaintiffs commenced caving at the point farthest away from the shaft; that the falling in in no way prevented the taking out of the balance of the ore, if plaintiffs had been allowed to run the ore out as they caved it; that the dirt would have been left behind and would not prevent the taking out of the remainder of the ore.

On further cross-examination witness testified that the ore in this mine was streaked with sand and other stuff besides ore. That when the ore was caved down in the way described the sand gets mixed up with the ore; in some parts of the mine was streaks of ore and sand five and six inches, and some parts of it was clean ore. That the caving system of mining is as good a way to mine it as any other when it is streaked with sand.

On further redirect examination, the witness testified in relation to the condition of the first level of the mine after the 29th day of June, as follows:

Well, the condition of it later on, the ore was all broken in those chutes, and we run some of the ore, and Mr. Bennett wouldn't accept it; he wouldn't let us send it up. Then Flod came down, and I asked him why they wouldn't let us send the ore up. He told me that Bennett wouldn't accept it. So I asked Bennett if he wasn't going to accept that ore and he said, "No."

George M. Knowles was sworn as a witness in behalf of plaintiffs, and testified that he was employed by the plaintiffs during the time they — working at the defendant's mine, under the contract in question; testified to various delays caused the plaintiffs by Bennett, the superintendent of the defendant, stopping the hoisting of ore, for the reason, as he alleged, that the ore was not good, and to great delays occasioned by want of sufficient landers at the top.

James Johns, sworn as a witness in behalf of plaintiffs, testified as follows:

I am one of the plaintiffs in this suit and one of the parties to the contract that has been spoken of. The name of my brother, now deceased, who was a partner in this matter, was Joseph Johns; he was a practical miner. We started mining ore under said contract about the 11th of May; we were in the mine and entered
87 upon the work about the 7th; we sent up no ore until the 11th, because the superintendent had no railroads cars to dump the ore in.

Witness testified to various delays for want of cars to load ore, and want of sufficient men at surface to handle timber and dump rock, and also to the dumping of several cars of ore by the defendant, which had been sent up by the plaintiffs, for the reason that it was claimed by the defendant that it was not up to the grade called for by the contract; that said ore was taken from the first level; that he had talked with the superintendent, Bennett, about the delays, and that Bennett had told him that he was unable to

get cars; that he had telephoned for cars and they had not come; that it would have cost them less to take out the ore that remained in the mine than it cost to take out what they did, because the ore that was left there was broken, and the ore they took out they had to break, and it was nearer the shaft; that he had made an estimate of the cost of taking out the ore from that mine by the system of caving adopted by them, and that it was 25 to 30 cents per ton; that in one day they took out and sent up 201 skips of ore, amounting to something over 300 tons; that they would be able, with the force they had, to take out about 200 tons per day of 10 hours; that he was present at the conversation between himself, his brother and Mr. Humble, and Mr. Bennett, about the 15th of July, in reference to changing the contract. This was after the receipt by plaintiffs of the letter on the subject of raising the grade of ore and extending the contract into the second and third levels, which was mentioned in the testimony of John Humble. The witness gave the following account of said conversation:

"Mr. Bennett wanted us to raise the grade from 56 to 58 per cent. metallic iron, and we were not willing to do that—
88 told him we were not willing to do it; and Mr. Humble says: What do you want us to raise the grade of the ore for, when it is going above that grade now? And he says: To make you boys a little more careful. And Mr. Humble says: We can not be any more careful than we are; we are careful now. And he was thinking they had to raise the grade, and Mr. Humble says: If we should raise the grade and should break any ore that wouldn't go that, that would go 56, you wouldn't take that. And he says: No, I don't care how you put it in, so the cargoes go at that, 58. This was after we started in the second level. We had put a raise from the first to the second level; it was about four days, I guess, after we started. This conversation had reference to what was coming out of the second level."

On cross-examination the witness testified that he could not tell whether the ore came up to the grade required by the contract or not. He could not tell whether what was left in the mine came up to 56 per cent. or not; that no one could tell whether ore is one or two per cent. above or below 56; that if there is any question about it, the only way to determine is to have it assayed; that from time to time Bennett would tell him the ore was not up to grade, and not to send up any more of that ore until it was tested, but that he couldn't tell whether Bennett was right in his statements or not; that there was a little sand in streaks among the ore all through the mine; that there was ore enough in the mine to take out 200 tons a day all the time they were there; he could not tell whether it would go 56 per cent. or not—nobody could tell that; they could only tell by assays that were made; that when they caved down the ore they got a part of it, and didn't take out the rest because
Bennett wouldn't take it, because he claimed it was too poor,
89 wouldn't go up to grade. I don't know whether that was right or not. I don't think he could tell except by having it

assayed. When the big cave was made in the first level, about the last of June, the mine was so filled up that we could not get in that level for a long time. We could have taken out the ore by getting into it and timbering up, but whether it was good ore, or 56 per cent. ore or not, I can not tell. When this final cave was made I saw some sand that came down from the surface, and some stones mixed up with the ore in some places. We could have got the ore out, if allowed, before the sand, &c., came down: we took out from two to three hundred tons in 24 hours a good many days. The delays kept us from getting out 200 tons; there was ore enough.

Witness further testified:

I remember my brother writing a letter at one time, in the company's office, to Mr. Tarbell, the general manager of the company, about the ore in the first level. I heard it read, but cannot tell what it contained.

A letter, dated August 14, signed Johns Bros. & Humble, was shown to the witness, and he was asked whether that was his brother's handwriting. He answered that he could not swear to his brother's handwriting; he hadn't often seen him write, and could not say whether it was or not. He remembered his brother writing a letter in the office.

Q. Do you remember what the letter was about?

A. Well, Mr. Bennett wanted me to write the letter first. I refused to write it. He told me that the company had been finding fault with him about the ore in the first level, and wanted me to write and tell the company that the ore was all taken out that was merchantable iron ore. I heard the letter read that was written by my brother, but cannot tell what it contained.

Mr. Tarbell, who signed our contract as an officer of the company, was at the mine several times while the work was being done,
90 and I had talks with him. I never complained to him about delays that we were having, or that we were prevented from sending up the ore. I knew he was one of the officers of the mine, and signed our contract.

The witness was re-examined by the plaintiffs' council, and testified as follows:

As a reason for wanting me to write the letter, Mr. Bennett told me that the company was telling him that some one was reporting that they were leaving lots of ore in the first level, and he wanted to have this letter written by us to take the blame off of his back.

Plaintiffs' counsel asked the following question:

"Did he have anything to say at that time about getting the stock run down, making heavy assessments and buying it in?"

The witness answered:

"Yes; he mentioned to me one time, if we should strike anything good in the bottom level to keep it quiet."

Defendant's counsel objected to further testimony on that subject as immaterial to the issue. The court overruled said objection, and to such ruling defendant's counsel excepted.

The witness, in further answer to said question, testified as follows:

"He said if we struck a good thing on the bottom level to keep it quiet, and they would call an assessment and buy in the stock; could make some money out of it, and get the stock for the assessment."

The witness further testified that if they had been permitted to take the ore out as soon as it caved, they would have got the ore out before the dirt came down; that there would have been no mingling of earth and stones from above upon it.

John Rowe, sworn as a witness on the part of the plaintiffs, testified as follows:

91 I have been engaged in the business of mining about 17 years. I was employed at the Anvil mine in 1888 by the plaintiffs; continued in their employ about 12 or 15 days; after that was employed by the superintendent of the Anvil mine to take charge of everything under the surface. Was in the employ of the Anvil Mining Company about a month and a half.

The plaintiffs were delayed occasionally in taking out ore, sometimes because Bennett wouldn't take out the ore, and at other times because they had but one lander for the two shafts. I stopped them lots of times for sending up ore; I did so by Bennett's orders; he said the ore wasn't up to the grade and he wouldn't take it. I have been up one day and stopped them and the next day gone down and set them to work again, sending up the same ore; that occurred several times. About the 2d of October the plaintiffs had caved a quantity of ore down, and I was sent down by Mr. Bennett to see about it. I went up and told Bennett that they had caved in, and he told me to go down in the morning and stop them. I went down and stopped them, and Humble told me to go up and bring down three boxes and take three samples, one from the inside lens, one from the outside, and one from the upper level. I went up and told Bennett what Humble said, and he told me to take one box and go down and take a sample. I went down and got a sample and took it up, and he looked at it and said that looked all right. I said: If you say so I will go down and start them again, and he said, No, I won't start them until the assay comes back. I never started them any more.

I was there at the time Mr. Boss and Mr. Channing examined the mine. About that time I was in the mine with Mr. Bennett and Mr. Humble. Mr. Humble says to me: John, who stopped you yesterday? I said Bennett. Mr. Bennett was about three feet

92 from me at the time. Bennett said that if he stopped them he didn't mean to. Before that, while the contractors were yet at work in the mine, I had a conversation with Mr. Bennett with reference to getting these contractors out of the mine. He told me if he could get the contractors out he would let me that contract when he could get a man to take my place.

Upon cross-examination the witness testified that at the time he stopped, the plaintiffs by Bennett's orders, he would admit that the inside lens of the third level was not as good as the rest, but if the ore was allowed to be mixed with the outside lens of the third and top levels, he thought it would have gone all right.

This inside lens on the third level and first level was 72 feet across; that the other lens which was of better quality, was 13 or 14 feet in some places, and in other places not so wide; that he never stopped the plaintiffs from working in the first level, nor in the second level; it was only in the third level; he stopped them lots of times, perhaps five or six times. When he stopped them they were not taking any ore; he always stopped them when they made a cave. Bennett would tell him to stop them until he could get an assay made and see whether it was good or not. He would tell them not to send up any ore of the new cave until he could test it, and that is what I would tell them. That was the case every time. Then, afterwards, he would tell me to set them to work again. I didn't know whether he had got the assay or not.

I went down on the 3rd or 4th of October, the time they had the last cave, and told them to stop; I told them that Bennett said the ore wasn't good, and they were to stop until the assay came back. The next day Boss and Channing came there and were down in the mine with Bennett and me, and Bennett then said if he stopped them he didn't mean to.

William Christopher, a witness sworn on the part of the plaintiffs, testified as follows:

I have had 23 years' experience as a miner. I work for plaintiffs in defendant's mine from May 9 to August 16, 1888. The plaintiffs were frequently stopped from sending up ore. When a cave was made the ore would run through a chute into the dump-car with a plank stopper. Once when stopped from loading through the chutes, I took some men and loaded the same ore three days and a half, and that went right through. It was put in the skip and sent to the surface. I don't know what they did with it. We loaded it with shovels and wheelbarrows. We were stopped three times in the top level, some times two days, some times one day. I was shift boss and could take out 150 tons every shift when not stopped. There were two shifts a day of ten hours each.

93 *Defense.*

G. E. Tarbell, sworn as a witness in behalf of the defendant, testified as follows:

I reside in Milwaukee, and am a director of the Anvil Mining Company, the defendant. During the year 1887 I was president and acting manager, and in 1888 I was secretary and treasurer and general manager. I executed the written contract with the plaintiffs in behalf of the company as secretary. I had a conversation with Mr. Humble and Mr. James Johns, particularly Mr. James Johns, before making the contract, as to the method they proposed to adopt in working the mine. He said he was perfectly familiar with the caving system of mining, and he was convinced from the condition of affairs at the Anvil mine that it could be worked better there than in any mine he had ever seen. He said the proper way to mine that ore on the caving system would be to take out the first floor on timbers, either square sets or drift sets, then go to the extreme end of the

level from the shaft at which the ore was to be taken, and make small caves by making up-raises over the sets in that particular part. This related to the first level. That was the only thing contemplated for a certainty at that time. That he would use on the lower level either square sets or drift sets on timbers, so that the cave would come in a little at a time, and that they would advance right adjacent to that and proceed in a similar way from the farther part of the level towards the shaft, so that the caves would be entirely behind the ore, leaving the ore that was left between the caving and the shaft.

94 I was there several times during the time the contract was running. First, in the early part of June I went through the mines with James Johns. He said everything was progressing satisfactory and they would be able to take out the ore as contemplated under the contract. He spoke of the fact that there had been one or two days when they had not had cars, or as many cars as they wanted, but said it made no material difference with them as they could have their men breaking down ore or making excavations preparatory to caving some part of the mine, so that they could load the ore the faster when they did get cars. He made no complaint whatever, either then or at any time when I was there.

I was there again about a month or six weeks after. I went through the mine with Mr. Bennett and Mr. Humble. Humble at that time stated to me that the ore was all or practically all out of the first level, in answer to my question whether any more ore could be got there; that is, after the main body of the first level had been caved down so that we could not enter it. He said nothing about any ore being in back of the cave. He claimed they had got out all the ore they could.

I was there again in September and had a conversation with Mr. Johns. He told me at that time that the ore that they could take out, that was up to grade, was nearly all out; that they were bothered with the sand that prevented them getting out more of the ore. That was James Johns. He said they were going to work until they could get it all out. I urged them to hurry their shipments with all possible speed, as they were going to cause us loss on their charters if they didn't get it out more rapidly than they had formerly; that if they did, of course they would have to stand whatever damage there might be in that respect. He said

95 they would do the best they could, but that so much of the ore was below the grade that it seemed almost impossible for them to do it.

So far as I could see in the second and third levels, they had not mined the ore in the manner that Johns had described to me. I was in the mine and saw what condition it was in before they commenced work, and have been in the mine since they ceased working there. Before they commenced there had been a cross-cut across the formation on the first level, I think to an extent of 150 or 200 feet, and drifts to the west and some to the east, and I think

four or five up-raises through the ore body, and it had been roomed out to the extent of about five sets in length, five in width and three sets high. The bulk of the good ore on the lower floor, under the whole lens or ore on the first level, had been mined, except where the pillar had been left for support. After the plaintiffs left their work, the first level was left so that you could not get into it at all, except for a very few feet from the shaft, and the entire surface, and ore and sand, &c., had been caved in, including the timbering that was in the mine when they went there. We could get only a very short distance into the cross-cut or adit. The material that filled up the cross-cut or adit was timber, ore, sand and stones, and I believe one stump from the surface came clear down to the first level. I did not see this until after the contractors had left the mine.

Since that there has been some work done on the first level, trying to get in and get out some ore. We have run a drift through a part, and run where this large cave had been made on the first level, and have also gone through some rock that was next to the shaft and running back behind part of that ore. It was very expensive to run the drift through to the part of the ore that was clean. The
96 ore and timbers were caved in together, and the timbers had to be chopped out under the greatest possible disadvantage, so that it made the work of running the drift in there very expensive.

The condition of the second level was somewhat similar, and the third level could not be got into at all. It was caved in the same way, and the sand and poor ore was intermixed with good ore.

The witness then testified to having chartered vessels for shipping the defendant's ore, at a certain price, and that owing to delays by the plaintiffs in getting out ore as fast as called for by the contract the defendant had been unable to provide cargoes for certain of the vessels chartered, and were compelled to recharter them at a loss, and that it was necessary for them, in order to ship the ore when it was furnished, to charter other vessels at a higher price than they had contracted to pay to the vessels they had chartered.

The witness testified to letters, one dated October 6, 1888, and one dated August 13, 1888, which had been written by him as general manager and mailed to Mr. Bennett, the superintendent.

Witness further testified that the leaving of the mine in the condition in which the plaintiffs left it, and caving it down in the manner described, was a damage to the company, because the remaining ore could only be taken out at a largely-increased expense, and there was quite a large body of ore remaining in the levels not up to the grade required by the contract, but which was valuable to the company by mixing it with other ore which they have of a higher grade and thereby making it merchantable ore, or it was even valuable to the company at the grades required by their contracts, or below those grades.

97 He further testified that the damage to the mine, from being worked in the manner it had been worked by the

plaintiffs, and being left in the condition described, was somewhere from $5,000 to $15,000; that the mine was worth that much less by reason of the condition in which it was left.

The letter, dated August 14, signed Johns Bros. & Humble, which was shown to Mr. James Johns, addressed to Mr. Tarbell, was shown to the witness, and he testified that he had received it by mail about the time it bears date.

On cross-examination of the witness he testified:

We expect, as a result of the caving system, a caving in of the surface and filling in of the space from which the ore was taken. This does not injure the mine if the ore has been taken out.

D. A. Bennett, sworn as a witness on the part of the defendant, testified that he was superintendent of the Anvil Mining Company, defendant, and had been for about two years; that he was employed at the time of the letting of the contract in question in this suit; that the plaintiffs commenced work early in May, under the contract. I had a conversation with James Johns before letting the contract, in which Johns explained the old English system of caving mines, called the caving system, to be cutting out rooms, leaving pillars, removing the ore from the rooms, and allowing them to fill with debris, and finally taking out the pillars, commencing at a point farthest from the tram road and shaft. I had no experience of iron-ore mining until three years ago.

The witness further testified that he could tell by reference to the shipping book kept by the company when the plaintiffs began shipping ore from defendant's mine. Witness produced said book, and testified that he saw the entries that were made therein every day, upon the dates they were made; that they were made under his direction by the bookkeeper at the mine.

Q. You say you saw them on the day they were made. Did you know then whether they were correct or not?

A. Yes, sir.

Q. What did you know about them?

A. I knew they were correct; I took the number of the cars myself.

Witness further testified, by reference to said book, that the first cars of ore mined by the plaintiffs under their contract were shipped away from the defendant's mine on the 9th day of May, 1888, and that 9 car-loads were sent away on that day of about 20 tons each, and that on the 10th there were 10 car-loads shipped of the same weight; that the ore was usually sent away the next day after it was mined and loaded in the cars, or on the same day.

Witness further testified, in regard to the said shipping book, as follows:

Q. Did you see the entries in that book from time to time as the shipments were made?

A. Yes, sir; I examined the books daily almost.

Q. And what can you say as to whether the entries of shipments made in the book are correct?

A. I believe them to be correct.

The witness further testified as follows:

There were very few delays for want of cars. I had one conversation with Mr. Humble about a delay, I think in July. He claimed that the chutes were all full of ore, and he would have to send his men home; he seemed a little provoked, and I was much
98 annoyed too; and I said: "Here, you need not send your men home unless you are willing to do it. No doubt there will be cars in the night or in the morning; but if you will lay your men off it will be an accommodation to us; but if you insist upon it we will hoist the ore and dump it on the ground." He said he didn't want to put us to any such inconvenience, and sent his men home. That is the only delay for want of cars that I remember of that he spoke to me about.

The witness further testified that he never refused to take up any ore, whether he had cars or not; never refused to hoist or accept the ore if it was up to the grade required; that the first eleven cars of ore dumped on the ground, testified to by Mr. Humble, were dumped because they looked on the top like poor ore; that he afterwards ascertained that they were better than he supposed, and gave the plaintiffs credit, and paid them for mining that ore; that he had some ten cars in addition dumped, but he had them carefully sampled and assayed by John Saultur, a chemist.

Witness further testified that the work of mining and caving was so carried on by the plaintiffs as to cave down ore, rock, and dirt together in the first level, and also on the second and third, crushing the timbers and filling up the mine, so that it was impossible to enter it or to take out any more ore, except by a great outlay in reopening the mine on the several levels, and that the mine was greatly damaged in value, by reason of such negligent working, to the amount of $15,000 or upwards.

After the cave in the first level he had a talk with James Johns about mining more ore there, and Johns told him that the thing was practically closed. They couldn't get any more ore and they abandoned that level; that immediately after that cave on the first level he began to negotiate with plaintiffs about extending
99 their contract into the lower levels; that he had made no negotiation with them on that subject before; that he had allowed them about the 25th of June to go into the second level for the purpose of making an up-raise to draw off the water from the first level.

Q. Did you allow them to go into the second level at that time or at any time before this contract was made for extending it to do any mining, except to relieve that upper level from water?

A. No, sir; no more than this: I allowed them to go into there before the contract was signed; they brought their contract to me to have it endorsed; told me they would accept the terms and the contract was left in our safe; I then allowed them to go in there before this contract was signed.

Q. You say they agreed to the change of the terms of the contract as expressed there?

A. Yes.

Witness further testified:

Just before this contract was changed I had not been in the mine for several days, and I discovered that they had gone into the second level and commenced working without any authority from me; I asked Mr. Humble why he did that; he said he was in there and he thought he would stay; I asked him what he meant by that, if he was not going to assent to the proposal to raise the grade of the ore; he said he didn't think he would; then I said, you must go out of there; I haven't given you any authority to go there; he said he was there and "I will stay there." I said, I don't think you can stay there with any advantage to yourself, and I turned to the engineer and told him not to run the skip to the second level until I gave orders to; then they assented to the contract; I never said anything to the plaintiffs to the effect that they couldn't mine any more on the first level unless they assented to the change in the contract; they had a right to work on the upper level as long as they wanted to, and nobody ever molested them or gave them any orders to the contrary; I didn't say that they couldn't work longer in the first level unless they consented to that change.

100 I received a letter from Mr. Tarbell dated August 13, 1888, and read the letter to Mr. Humble or Mr. Johns, or perhaps to both of them. Said letter was offered in evidence and read to the jury, and was as follows:

"I am very much pleased with the good news contained in your letter of the 10th inst. Since I saw you I had been thinking the matter over very thoroughly, and I couldn't understand why we didn't get more ore out of the first level, as it was very evident at the time I went through the mine with the directors that there was a very much larger amount of good ore shown up in the first level than has since been taken out. In fact, Mr. Boss and Mr. Channing, I believe, estimated the same, after making a survey and noting that part of it which was clean ore, that there was 30,000 tons of good ore in that level; but your letter somewhat explains this, and I imagine that quite a lot of that ore can yet be secured."

I showed that letter to the Johns brothers in the office. They said that Tarbell couldn't find any fault, because they had got all the ore out that was there—there wasn't any more ore there to get. I said: You see, he does find fault about it. I am not prepared to say whether there is ore there or not, but inasmuch as he does, and you think you have got it all out, just sit down and write him a letter saying you have got it all out; and they did it. I said nothing about getting them to do it to take the blame off from me. They decided to write the letter, and finally Joseph Johns wrote it at my desk. After he wrote the letter he read it aloud to me and his brother and sealed it up, and it was put in our mining mail to take to the office.

Said letter, which is the same one that was shown to James Johns during his testimony, as above set forth, was produced and identified by the witness. Said letter was then offered in evi-

101 dence and read to the jury, and was as follows:

"BESSEMER, MICHIGAN, AUG. 14, 1888.

Gage E. Tarbell, Milwaukee, Wisconsin.

DEAR SIR: We see by your letter you sent to D. A. Bennett, supt. of Anvil mine, that you are somewhat dissatisfied with the amount of ore taken from the first level in No. 1 shaft by contractors. We will say, in regard to this, that we could have taken out a great amount of ore that would run from 30 to 50 or 55 per cent. iron ore. This, of course, would not be in accordance with our contract, but the commercial ore of that first level have practically been taken out, and I do not think there is five per cent. of commercial ore left in and above first level. Of course when the board of directors visited the mine it was cut up in such shape that it showed a great deal larger than it really was. It was a mere shell.

Yours very respectfully,

JOHNS BROS. & HUMBLE."

At that time the modification of the contract was agreed to and endorsed on the contract, which has been read in evidence. My letter to the plaintiffs in regard to the modification was written on the 12th, and I went to Milwaukee the evening of that or the next day—was in Milwaukee but one day and came back the next night. The modification agreement was signed a day or two after I returned. They first went below the first level to mine, with my consent, as soon as they consented to the terms of the modification. They did no mining after that on the first level, except they kept a couple of men there for two or three days.

102 They started in the second level putting in drift-sets on the first floor. Their idea was to cover that floor, or as nearly so as they could, with drift-sets, covering the drift-sets with lagging, cutting out the lagging and making shoots of each particular set, shooting down the ore through the set, but before they could accomplish that purpose they had taken out so much ore on the hanging side that that came in and crushed in the back from the hanging side, crushing some of their timbers. Then they abandoned that idea and went to operating as they had done in the first level, near the foot wall. They upraised there on the start on very good ore. The ore inside was not so good, and they upraised there so wide and high that it finally came down and crushed down the whole business. The condition of the level then was that it was all crushed down. The cave brought down some of the timbers from the first level and sand and boulders.

They then went into the third level, conducted their work in the same manner, and with the same result. The third level was a lower grade of ore; I do not think there was any ore in it that would come up to the grade required by their contract.

Q. State what you did, if anything, in reference to stopping them in the third level?

A. I advised them to stop a long time before they did on account of the very low grade of the ore. As long as they could mix it with the upper ores from the second and third levels on the foot-wall

lens, which was a higher grade, I was satisfied to have them take out some of that ore. I urged upon them to do all they could to produce as large a quantity of ore as they could, and mix it in such a way as to keep it up to 58 per cent.

I had samples taken from all the skips of ore as they came up and had assays made. The assays were made by Mr.
103 Souther, at Hurley, and it usually took from two to three days to get returns.

I didn't send anybody to stop their work under the contract. John Rowe was in the employ of the company as a timberman. About the 3d of October ore was coming up very sandy, in fact it was nearly all sand. I told Rowe to go down and see those men and have them quit sending up this sand; that they had better stop it. I said: You had better tell them to send up a skip from the first level and we would take it. I had no talk with Humble or Johns that day about their being stopped from work. The next day they were there with Boss and Channing, and I went into the mine with them—into the first and third levels. We then discussed the question of how much ore they could use from one point to mix with ore at another point. I told them I wanted them to mix ore from the third level with ore from the first, so as to keep the grade up to 58. I expressed my opinion that if they would put in one skip from the third level and two from the first they would keep the grade up. Humble claimed to me at that time that he had been stopped from working. I said, "Who stopped you?" He said, "John Rowe." I said, "Don't you know I am the only man in authority around this mine, and accessible at all hours of the day or night? When you are stopped at this mine you get your orders from me or you need not consider it at all.' He claimed that Rowe had been sent down there and stopped him, and I said, "Rowe had no authority to stop you." I said, "All we want you to do is to do the fair thing, and give us the ore up to 58, and we are willing you should get thousands of tons of it." They went to work again after that and worked several days before they finally quit.

Boss and Channing were there sampling these places on behalf of Humble and Johns. They took samples from the third level, and from the room on the first level near No. 1 shaft. That was
104 the occasion of Mr. Channing's inspection of the mine, upon which he wrote the letter of October 4.

The witness produced a letter, written by G. E. Tarbell to himself dated October 6, which he testified he received on the 7th, and showed it to Mr. Humble and Mr. James Johns. Said letter was offered in evidence and read, and was as follows:

"Mr. D. A. Bennett, Bessemer, Michigan.

DEAR SIR: Your favor of the 4th inst. is noted, and I think we will derive as much benefit from the sampling from Mess. Channing and Boss as will the contractors; in fact, we are not only willing, but anxious that they should take out such ore as they could, without injury to the mine, that will run up to 58 per cent. I do not understand why they were unable to get into the third level."

The witness further testified:

I recollect writing the letter to Johns Bros. & Humble, dated Oct. 6, which inclosed a copy of Channing's letter of Oct. 4, and sending or delivering it to them. I got no response from them to that letter, nor did they say anything to me about it afterwards. They went to work after that and worked two or three days I think, doing some work on the first level, and they may have done some in the third, I don't remember, when they finally quit and went away. I didn't direct them to do so. I never, under any circumstances, ordered the plaintiffs to quit work under their contract. They didn't go on and timber up the room in No. 1 shaft, as was directed by the mining inspector; our company timbered it up afterwards at an expense of about $200. Since plaintiffs quit mining, we have taken out about 1,500 tons of ore from the first level. The cost of getting that ore out was about a dollar a ton, including timbering.

105 Upon cross-examination the witness testified:

"The average of the ore proper in the first level, I should think, was fully up to 60 per cent. metallic iron."

He further testified that he estimated that there must have been left on the first level, after plaintiff quit work, somewhere from fifteen to twenty thousand tons that would go above 56 per cent. metallic iron. He didn't think any was left in the second level, or in the third level, that would go as high as 56 per cent.

The witness further testified:

At one time last summer Humble came into my office to see me about the work, and was a little bit insulting. I didn't want to have any row with him, and I told him to get out of there, and if he wanted to do any business with me he had better send his partners.

John Souther, sworn as a witness on the part of the defendant, testified that he was an analytical chemist and assayist, and had made a large number of assays of samples taken from the second and third levels of the Anvil mine during the summer of the year 1888, while the plaintiffs were carrying on their contract; and his testimony tended to show that the greater portion of the ore in the hanging-wall lens, on said second and third levels, was below the standard of 58 per cent. metallic iron, and that the ore in the foot-wall lens was above 58 per cent. metallic iron, and he sampled the ore that had been dumped from the cars, as testified to by the witness, Bennett, and assayed the same, and it yielded only 53 60-100 per cent. metallic iron.

C. M. Boss, sworn as a witness on the part of the defendant, testified that he was a mining engineer, and was in the Anvil mine in the month of December, 1887, and made a survey of the first level at that time. From the limits of work done, from the extent of lines he was able to take of the survey, he estimated that the body of ore originally, including where it had been taken out, provided it was all ore, would approximate somewhere about 44,000 tons, that is, the main body of ore on the first level; that there was a south

lens that would perhaps contain two or three thousand tons more, that is, the lens next to the foot wall; that he observed a great many streaks of sand and bodies of sand and rock in amongst the ore; that, at a rough estimate, at least 15 per cent. should be deducted from that amount for sand and rock. He could not tell about the grade of the ore, or how high it would run in iron. That he was there again October 4, 1888, at the request of the plaintiffs, and examined the third level, and took samples for assaying; that the large lens on the third level, that is, the north lens, assayed 56.13 per cent. metallic iron, and that in the foot-wall lens on the same level assayed 59.55 per cent.; that was a lens only five or six feet in thickness. That he took a sample from the foot-wall lens on the first level, which assayed 62.83 per cent. metallic iron; that the room in that lens on the first level was probably 12 or 13 feet wide by 18 feet long and possibly 18 feet high; that he didn't know whether the ore extended beyond that or not.

106 Q. You have estimated that in this mine there was, perhaps, 44,000 tons, making a deduction of 15 per cent., at least, for rock and sand. Was it on the first level?

A. Yes, sir.

Q. Can you give an estimate of how much had been taken out of this timbered room and the openings before the contractors commenced their work; that is, the mine when you surveyed it in 1887?

A. At the time I made the survey there had been approximately 10,000 taken out; that is, the excavation represented that. I don't say it was all ore.

Q. Assuming that there had been that much taken out before the contractors commenced, and they took out eight or nine thousand tons, how much would be left out of the 44,000 tons, after deducting the waste you speak of?

By the COURT: There would be about twenty-three thousand tons of clean ore.

The WITNESS: There would probably be somewhere in the neighborhood of nineteen or twenty thousand tons of ore left there, assuming the hypothetical case, in such condition that probably it would cost, perhaps, to exceed a dollar a ton to take out if it was clean ore, but whether it is at present in condition to take out to be merchantable or not, of course I do not know.

Q. On that hypothesis, what would be the damage to the mine?

A. On that hypothesis it would be, perhaps, eighteen or nineteen thousand dollars, assuming it to be all clean ore. I would amend that; that is, it would cost that to take it out.

Nicholas Floyd, a witness on the part of the defendant, testified that the room in the first level that had been mined out when plaintiff's commenced work, was about 35 feet square and 14 to 21 feet high, and that there was ore above the room.

David Clifford, a witness on the part of the defendant, testified in regard to the room that had been mined out before the plaintiffs had commenced work, as follows:

Q. Was there ore above the timbers?

A. There was ore above it.

Q. How high up did the ore extend?

A. That's more than I can tell.

Q. You were up there at work?

A. Yes, but never measured it.

Q. Give us an idea?

A. It might be 60 or 70 feet, I can't tell exactly.

Q. What proportion of the ore above had been taken out by making these drifts and this rooming?

A. Oh, I suppose about half of it was taken out altogether.

J. Parke Channing, a witness on the part of the defendant, testified that he went with the witness, Boss, into the room west of No. 1 shaft on the south lens in the first level, October 4, 1888, and with the assistance of Mr. Boss, sampled all the broken ore that lay over the bottom of the room, about 100 tons, and the analysis of that showed 62.83 per cent. metallic iron.

S. F. Bennett, a witness for the defendants, testified that he heard the plaintiff Humble several times speak about having suit
107 with the company along after they had trouble about dumping cars, and so on. He said he didn't see as he could get along without having a suit.

Q. Did you hear anything else from him in regard to his suit with the company or how he expected to make his money? I want you to give us all he said.

A. I heard him say that he claimed from the company the ore in the third level.

Q. When was that?

A. At that time.

Q. Anything else?

A. Said he had been stopped getting the ore out of the third level; he didn't know but he would have to commence suit to recover for taking out the ore in the third level.

Q. He said if he was stopped from taking that ore out in the third level?

A. Yes.

Q. Did he say that he had been stopped or that there had been any stoppage?

A. I heard him say he was stopped.

Q. That was along in June or July you say?

A. No; I think it was along in the month of October.

"Rudolph Stepin, a witness for defense, testified on cross-examination that there were no cars shipped with plaintiffs' ore on May 13, 18, 20, 28, June 2, 3, 4, 11, and 18th."

"John Humble, recalled in rebuttal, testified as follows:

When we made what was called the Big Cave on the 29th of June we had caved out each end of the mine back to the timbers; put our raisers across the timbers each way and put the pillars right over the timbers, and when it commenced to move it settled right down easy on those pillars; we did not blast out the pillars at all; I was on top when it went down; the surface settled with the ore,

but there was no hole through to the surface; when I went down into the mine I found some of the lagging broken and some ore had fell through; all the chutes were full of ore; we run some of the ore from the chutes and Bennett refused to accept it."

The foregoing is a substantial statement of all the evidence introduced on the trial of this cause relating to the questions involved in the exceptions taken by the defendant's counsel and herein set forth, and is all the testimony that was introduced on said trial tending to show that the plaintiffs were ever stopped or prevented from proceeding to take out ore under their contract, or tending to show the grade of any ore that was left in the first level of said mine after the plaintiffs ceased to work under their contract, or to show the quantity of ore so left, containing 56 per cent. or upwards of metallic iron.

Defendant's counsel thereupon requested the court to rule and to instruct the jury that the written contract introduced in evidence, as modified, required all ore that should be taken out of the mine thereafter under that contract, no matter from what part of the mine, should contain at least 58 per cent. metallic iron.

The said circuit court refused so to charge the jury as so requested, but ruled with respect thereto as follows:

108 "In reference to that question, it has been a matter of considerable difficulty in the mind of the court to determine just how that should be regarded, but I am satisfied that, with respect to the second and third levels, the evidence shows such uncertainty in regard to the grade of the ore on those levels and remaining in those levels that it would not be safe to adopt as a measure of damages the definite proposition that there was so much ore of the grade stipulated for, namely, 58 per cent.; but with respect to that on the first level, it seems to me that the evidence is so far definite and uniform with respect to the quality of the ore on that level that the court ought to leave it to the jury to determine what the grade of the ore was in that level, and if they are able from the evidence to determine that it was of the grade up to 56 per cent., or that some definite quantity which they can ascertain by the evidence, not blindly, but it must be on some basis satisfactory to their judgment and consciences; but if they can ascertain from the evidence that some definite portion of ore remained in the first level, and the plaintiffs were prevented from getting it out by the fault of the defendants, and the plaintiffs desired to and proposed to take out that ore under the contract, that it may become an element in the damages which the parties may be entitled to recover under instructions which will be given in reference to that subject.

With respect to the construction of this secondary contract the court is unable to agree with your construction of it. It will be remembered that the original contract provided that the ore to be mined should be from the first level, and then stipulated, if the parties of the second part should elect, the contract might be extended to the second and third levels.

Then, later on, after the first level had been mined, the parties

entered into a supplementary written agreement as follows: 'It is mutually agreed by the parties to the within agreement that this contract shall extend to and include the ore contained in the second and third levels as named therein, with the exception that the merchantable iron ore extracted under this contract shall contain as much as 58 per cent., or upwards, of metallic iron.'

I think what the parties meant by these words, 'this contract' is this supplementary contract here endorsed, and that the contract should be construed to mean that the ore extracted under this supplementary contract shall contain at least 58 per cent., and that it was not within the minds of the parties to stipulate in this supplementary contract that what ore might be thereafter produced from the first level should be of the grade of 58 per cent."

Defendant's counsel thereupon excepted to the refusal of the court to charge as above requested, and to the ruling that, after the execution of the said supplementary contract, the contract would be satisfied by the mining of iron ore in the first level of the grade of 56 per cent. or upwards.

Defendant's counsel further requested the court, in numbered paragraphs, to charge the jury, and the court ruled upon said requests as follows:

109 No. 2. There can be no allowance to the plaintiffs as damages for stoppage of their work under the contract, if they were stopped, of loss of profits they might have made by further prosecution of the work thereunder.

Said court refused so to charge the jury, to which refusal defendant's counsel excepted.

No. 3. There is no evidence from which the jury can find that any definite quantity of ore, in addition to what was taken out by the plaintiffs, of the grade required by the contract, could have been taken out by them at a profit. Such profits would be altogether too contingent, uncertain, and speculative to be allowed as damages in this suit.

Said court refused so to charge the jury, and to such refusal defendant's counsel excepted.

110 No. 4. There is no evidence from which the jury can find that the plaintiffs were prevented by the defendant from taking out all the ore they were entitled to take out under their contract.

Said court refused so to charge the jury, and to such refusal defendant's counsel excepted.

No. 7. If the plaintiffs refused or neglected to take out all the ore required by the contract to be taken out by them, but mined only such part thereof as could be mined by them at least expense, leaving that which could be mined only at a greater expense, they are not entitled to the contract price for such as they did mine, but only to the reasonable price for such as they did take out, and the claim for ore actually taken out must be reduced to such sum as would be a reasonable compensation therefor. If the amount paid them is equal to such reasonable compensation for all the ore mined by the plaintiffs, they are not entitled to recover anything further.

Said court refused so to charge the jury, and to such refusal defendant's counsel excepted.

No. 13. There is no evidence that the plaintiffs were stopped or prevented by the defendant from completing their contract, and no damages can be allowed on that account.

Said court refused so to charge the jury, and to such refusal defendant's counsel excepted.

Said court then proceeded to charge the jury as follows:

"Gentlemen of the jury:

In this case, as in every other, it is the province and duty of the court to ascertain and determine the principles of law which are applicable to and govern the case, not only in the construction
111 of writings between parties, but also in regard to the general principles of the law that must determine the rights of the parties.

It is the province of the jury to ascertain and determine the facts and to find a verdict, under the instructions of the court, according as they find the facts and adapt them to the legal propositions laid down for their guidance by the court.

It is of prime importance that the jury then should correctly understand the legal propositions, as declared and laid down to them by the court.

This is done upon the court's responsibility, and the jury are to take the law as laid down to them as absolute, and they are to determine the facts and reach the result according to the principles thus laid down.

This proposition, applicable in every case, is of special importance in a case like this, where there is, to say the least of it, considerable confusion, and propositions of law and propositions of fact are mixed up and blended together.

It will therefore be necessary for you, in order to perform and discharge your duties aright, that you should give special heed to the legal propositions which are laid down by the court, in connection with the facts, which you are to solve from the testimony.

In the hope of bringing some order out of the confusion that exists in the case, upon the claims and testimony, I will state to you and ask you distinctly to bear in mind the nature of the claims of these respective parties.

In the first place, the plaintiffs claim damages from the defendant for the amount unpaid for ore mined in September and October. That claim, as the court understands, standing by itself, is not controverted, and the facts I believe are substantially agreed
112 upon. I do not know whether the jury have them or not, but if not they can be handed in by counsel.

For the purposes of this case, then, you will take that claim as established, and the plaintiffs would be entitled to interest upon it at six per cent. from the time it should have been paid.

Second. The plaintiffs claim for the amount of wages which they paid, including their own loss of time, which in the testimony is blended with the wages paid for lost time during the several periods

when, as they allege, they were delayed, by the fault of the defendant, in the prosecution of the work.

This is the second claim. The law, as applicable to this claim, will be stated later on.

Third. They claim for loss of profits, which they say they lost, by reason of their being prevented by the defendant from completing the contract; that is, from getting out the balance of the ore.

Upon the circumstances of this case, and the evidence as disclosed, I think that this claim must be confined to damages under the original contract. In other words, to a claim for the loss of profits which they might have made in extracting the ore under the original contract upon the first level, the view of the court being that the evidence is too vague and indefinite to furnish any reliable data or basis upon which we can estimate the amount of ore in the second and third levels, which would come up to the grade of 58 per cent. There would be too much conjecture and guess about it to be the basis of an adjustment of legal damages between these parties.

But with respect to the ore remaining on the first level, the court will submit the evidence to the jury, and it will be a ques-
113 tion for them to ascertain, if you can, from any evidence in the case which you regard as sufficiently definite, giving to you such certain information as that you can determine what amount of ore of the grade of 56 per cent. remained not mined in the first level.

But these claims are all denied on the part of the defendant, except the first. The last two are denied by the defendant.

Now, on the other hand, the defendant claims damages, as is shown upon the pleadings, and upon the evidence as adduced in the case, according to the inferences which the defendant seeks to derive from it, first for the amount of excessive freight paid by failure on the part of the plaintiffs to produce the ore seasonably. The amount of that freight, I believe, is not disputed.

Mr. BALL: The amount given by the deposition is $1,165.75.

The COURT: If the jury find from the evidence that that excess of freight was paid by the defendant, in consequence solely of the failure on the part of the plaintiffs in producing the ore under the contract, so that it could have been shipped before the rate of freight rose, then that claim may be allowed, if the failure, as I say, was the failure of the plaintiffs in failing to get it out.

Of course the jury will understand from this that if the failure to get out this ore was not alone the fault of the plaintiffs but was the fault of the defendant as well, or if, to state the proposition in another form, if the defendant prevented the plaintiffs from getting the ore out seasonably, they could not of course complain that the ore was not seasonably produced. A man could not allege his own fault as the basis of recovery against another party, but if the plaintiffs neglected, without good excuse or reason produced by the action of the defendant, from producing and bringing forward the ore seasonably, then you may estimate that item of dam-

114 ages and include it in your verdict, because, upon the pleadings in the case, as will be finally stated to you, the jury will be at liberty to find a verdict one way or the other for the plaintiffs for a definite sum, or for the defendant for a definite sum, upon the aggregate and balance of all the respective claims which are established in the case, so that complete justice will be done between the parties.

As I have said, the first claim on the part of the defendant, then, is the amount of this excessive freight paid.

Second. They claim damages for the failure to produce the ore at the contract price, which they say was less than it will cost the defendant to get it out.

As to this, if the plaintiffs failed—refused without good reason—to bring out at least 75 per cent. of the ore on the first level, because these damages both ways are to be restricted to the first level, the rule which I have stated in regard to the uncertainty applies in one case as well as the other. If the plaintiffs failed, without the fault of the defendant, to mine all the ore on the first level, or mine at least 75 per cent. of it, as they agreed to do by the contract, then they are liable to the defendant for the amount which it would cost, if any, over 60 cents a ton to mine the balance of the ore which was of a grade stipulated for in the contract.

Third. The defendant claims damages to the mine from its being unskillfully worked and being blocked up and filled in places with debris. This statement of this third claim is sufficiently definite for the purpose of this preliminary classification; but I might say here, in passing, that if you find that by the unskillful management
115 and working of this mine by the plaintiffs that the mine was blocked up and filled with rubbish so as to make it more expensive to mine the balance of the ore, that is to be taken into account, because it was a part of the duty of the plaintiffs to do this mining in a reasonably skillful and workmanlike manner, and if they did not do it, and damage resulted to the mine, they are accountable for the damages which the mine owners will sustain in consequence of it.

But all of these several claims on the part of the defendant are denied by the plaintiffs.

The evidence in respect to each and all of these claims pro and con, is in the case and for your determination, except, of course, so far as the respective claims are not controverted, and those you can simply take amounts of and go no further.

This last observation applies specially to the first claim of the plaintiffs for the ore that was mined in September and October, and it applies, according to the court's recollection of the testimony, to the amount that was paid for excessive freight by the defendant.

Requests to instruct the jury have been delivered to the court by counsel for the respective parties, and as these requests cover substantially all the grounds of controversy, the court will proceed to give such of them as it thinks in accordance with the law, giving such modifications as the court finds necessary, and the court may

perhaps, as it proceeds, explain the application and limitation of the propositions which it will now deliver to you in accordance with the requests.

In accordance with the first request of the plaintiffs, the court charges, with the modifications which will be read with the request as follows:

116 "The defendant admits the execution of the contract sued upon in this action, and I charge you that the plaintiffs are entitled to recover in this action if you shall find from the evidence that they have performed the contract according to its terms, so far as they were permitted by the defendant. If you find from the evidence that they have not fully completed the contract, but have performed it according to its terms as far as they were able to do so, and were prevented by reason of the unlawful interference of the defendant, then I charge you that they are entitled to recover of the defendant, first, for the number of tons that you shall find the plaintiffs have delivered to the defendant, under and according to the terms of the contract, at the price named in it, to wit, sixty cents per ton, less the amount you find the defendant has paid plaintiffs upon the contract."

This is but another way of stating that you should give to the plaintiffs the amount of the September and October bills, as there is no evidence in the case, so far as the court remembers, creating any discrepancy in the claims of the parties respecting the amount prior to that date.

"If you find from the evidence that the plaintiffs have in good faith fairly performed the contract according to its terms, as far as they could, and have been interfered with and been prevented from the further performance of the contract, by the unlawful interference of the defendant, then and in that case the plaintiffs are entitled to recover from the defendant all such gains and profits as they could and would have made had they been allowed to proceed and complete the contract according to its terms."

But I add, this must be taken in connection with the other propositions contained in this charge and it must be limited
117 to the ore upon the first level, the loss of profits in mining the first level.

The second request of plaintiffs I also give, but will make a comment upon it when I reach the end.

"That by the terms of the contract the plaintiffs were entitled to deliver any ore from shaft No. 1 and the first level of that shaft that would assay fifty-six one-hundredths of metallic iron, up to the 10th day of July, 1888; and further, that the acceptance of ore by the defendant is conclusive as to its quality, unless it is shown that plaintiffs procured its acceptance by fraud or concealment; and defendant cannot be allowed to defend upon the ground that it was of a lower grade than the contract called for."

I have given this; at the same time I say to the jury that I doubt if this has much application to the case upon the facts, as I do not see any ground for claiming that there was any fraud or con-

cealment on the part of the plaintiffs, or that there is any question with respect to the amount of the ore which was delivered to and accepted by defendants.

"Third. If the jury find from the evidence that the defendant advised and directed the plaintiffs to take ore from the mine of a lower grade than 56 per cent., and mix it with a higher grade, so as to make an average grade of 56 per cent., then the plaintiffs had the right so to do, and the defendant cannot now complain."

That is correct, so far as such a stipulation, or privilege, rather, was acted upon and executed; and the same proposition would apply as to any ore produced from any of the levels, if it was produced in accordance with the direction or stipulation that it might be produced from several portions of the mine and mixed
118 up so as to bring it to a grade; that was conclusive upon the parties, so far as it was done and acted upon; but the fact that it was done would not give to the plaintiffs the right to continue that any longer than the defendant was willing it should be done. In other words, it is good so far as executed, but is not obligatory for the future.

"Fourth. If you should find from the evidence that the plaintiffs were ready and willing, and had ample means to deliver two hundred ton- a day of good, merchantable ore yielding 56 per cent. of metallic iron, and were prevented from so doing solely by the failure of the defendant to receive the ore because of a want of cars; or if you find that defendant refused to receive good, merchantable ore that would yield 56 per cent. of metallic iron, then and in that case the defendant cannot now complain, and the plaintiffs are not liable in damages for the failure to deliver the 200 tons per day stipulated in the contract."

This proposition is applicable to the ore on the first level. To make it apply to the second and third levels we must substitute 58 per cent. for 56 per cent. in this proposition; so that, as to that the result would be that if you should find, from the evidence, that the plaintiffs were ready and had ample means to deliver 200 tons per day of good, merchantable ore from the second and third levels yielding 58 per cent. metallic iron, and were prevented from so doing solely by the failure of the defendant to receive the ore because of want of cars; or if you find that defendant refused to receive good ore that would yield 58 per cent., then in that case the defendant can not complain, and the plaintiffs are not liable for damages for the failure to deliver the 200 tons a day stipulated in the contract. I say, if the plaintiffs were prevented by the defendant, solely by the failure of the defendant to have ready the
119 cars to receive the ore, or on account of the failure to have cars, refused to receive the ore—I say solely, because you will see a little later on that some modification is made to this on account of the necessity of applying some test to determine the quality of the ore. I call your attention to it now so that when I come to refer to that you may apply it to this instruction.

"Fifth. If the jury find from the evidence that, during the pro-

gress of the work, the defendant neglected and refused to receive the ore which the plaintiffs were ready to deliver from the first level, because it had not cars in which to ship it, and such ore was good, merchantable ore and would yield 56 per cent. metallic iron, then and in such case the plaintiffs are entitled to recover such damage as they actually sustained by such refusal and failure to take such ore, such damage to be measured and determined by the amount of wage money the plaintiffs had to pay to their men when kept in idleness by such neglect and failure of the defendant."

I give you this instruction, and apply this test to the measure of damages, upon the concession of counsel that, if the facts are as stated, this may be the test. The court does not agree with counsel as to what is the legal test, but as they agree upon it, the court will adopt their construction and let the instruction stand as written, the view of the court being that the damages would be the value of the time and work which might have been put in during that time, rather than the amount paid by the plaintiffs to their help. I say this because I wish to have the court keep right, so far as it can, upon the record.

The 6th and 7th requests, on the part of the plaintiffs, as written, are refused. And I will state that the reason for refusing them is principally because I think that upon the facts as disclosed
120 by the evidence, and because of the failure of the plaintiffs to make any tests or analysis of the grade of the ore before it was shipped out, that the defendant was entitled to a reasonable time for opportunity to make a test or analysis. In other words, if the plaintiffs, without regard to the quality of the ore, sent it up, the defendant, before it could be compelled to accept it and ship it off, was entitled to a reasonable opportunity for applying a test.

The 8th request is given, as modified:

"If the jury find from the evidence that the plaintiffs were in good faith endeavoring to carry out and perform said contract according to its terms, and the defendant wantonly, or carelessly and negligently interfered with and hindered, and prevented the plaintiffs in such performance to such an extent as to render the performance of it difficult and greatly decrease the profits which the plaintiffs would otherwise have made, then and in such case such interference was unauthorized and illegal and would have justified the plaintiffs in abandoning the contract, and would have entitled them to recover such damages as they actually suffered by being hindered and prevented from performing such contract;" subject to the limitation that I have already stated, that delay caused by the necessity for ascertaining the grade of ore would not justify the plaintiffs in abandoning the contract, nor give any ground of damages. That is to say, the ore not being tested, or the grade of it determined before it came out of the mine and was ready for delivery to the defendant, the defendant was entitled to any reasonable delay made necessary for the purpose of procuring an analysis or test of the ore. They were not obliged to receive it without applying some test, having some means of knowing whether it would stand up to the grade of the contract or not.

121 And now, gentlemen, if these delays, or any of them, which the plaintiffs may have suffered in this case, were caused, not by the failure of having cars there, were not caused by the refusal of the defendant to receive the ore, because of a lack of cars, but the delay was caused by the refusal of the defendant to receive the ore before a reasonable time had elapsed for making some test of it, then the plaintiffs could not recover for such delay; and it will be somewhat important in this case that you keep this distinction in mind, because a delay that was caused by failure to have cars in readiness stands on entirely different ground from delay made necessary to ascertain the grade of the ore.

It was the duty in this contract of the plaintiffs to see to it that the ore sent up was of the grade stipulated in the contract, and they could not complain if, not having applied the test themselves, *if* the defendant should take a reasonable time for the purpose of having the test applied.

I also instruct you, as requested in the first request of the counsel for the defendant, as I have modified it:

"The original contract was modified by consent of the plaintiffs, so as to raise the grade of the ore to be produced under it thereafter to 58 per cent. of metallic iron, and was extended to the second and third levels of the mine; and if the defendant refused, before this modification was agreed to, to allow the plaintiffs to proceed to take out the ore on the first level, under the contract, unless they would consent to such modification, the plaintiffs by so consenting waived any right of action they might have had for such refusal if they had declined to modify the contract."

Second. The second request is refused.

122 The third request is refused as written, but is given so far as it applies to the second and third levels:

"There is no evidence from which the jury can find that any definite quantity of ore, in addition to what was taken out by the plaintiffs, of the grade required by the contract, could have been taken out by them at a profit. Such profits would be altogether too contingent, uncertain, and speculative to be allowed as damages in this suit."

This is substantially a reiteration of what I have charged you before; namely, that damages can not be recovered in this case upon the breach of the contract on the part of the defendant to permit the ore to be taken out of the second and third levels.

"Fifth. If the plaintiffs neglected to produce ore as fast as the contract required, without reasonable excuse for such neglect, and the defendant suffered damages as the consequence of such neglect, the defendant is entitled to set off such damages against any balance earned by the plaintiffs in mining ore, and to have the balance a verdict in their favor for the balance of such damages, if any."

"Sixth. If the plaintiffs, without good cause, failed to produce ore of the grade required by the contract, at the rate the contract required, and by reason thereof the defendant was compelled to pay

higher rates of freight to transport the ore, or a part of it, to market, and the plaintiffs, in entering into the contract were aware that the ore was to be so transported, and that their failure to mine ore as fast as required would be likely to subject the defendant to such increased freight charges, the defendant is entitled to have such increased freight charges allowed it in this suit."

123 "Eighth. If the plaintiffs abandoned the work without just cause, before taking out all of the ore of the required grade, the defendant is entitled to such damages as it has shown it has suffered, if any, by reason of such abandonment."

"Ninth. If the plaintiffs conducted mining operations under the contract unskillfully or negligently, not in a good, workmanlike manner, and by reason thereof the defendant's mine was left in a bad condition for future mining, so as to be injured in value by such unskillful and negligent working, the defendant is entitled to such damages against the plaintiffs as it has shown it has suffered thereby."

"Tenth. If, under the instructions given, the jury find that the defendant is entitled to damages against the plaintiffs, such damages must go to reduce the amount, if any, found due the plaintiffs, and if such damages exceed the amount due the plaintiffs the defendant is entitled to a verdict for the balance."

"Eleventh. If the defendant had good reason to believe that any ore that the plaintiffs were sending up from the mine and which had not been tested was not up to the standard required by the contract, it had a right to refuse to receive such ore for a reasonable time, to obtain an analysis, or otherwise ascertain whether it was up to the required standard."

"Twelfth. It was the duty of the plaintiffs to see to it that the ore they were mining from time to time was of the grade required."

With respect to the ore upon the first level, there is evidence tending to show that on or about the 14th day of August, 1888, the plaintiffs wrote to the defendant company at Milwaukee a

121 letter of that date, in which it was affirmed by them that all of the ore, at least within five per cent. of it—to speak more accurately, within five per cent. of all the ore on the first level that was within the terms of the contract—had been taken out. This letter, written by the parties while this work was in progress, while this transaction was in progress, is evidence of considerable importance for the jury to take into account in ascertaining and determining what was the fact. I call your attention to it because, being a writing made at the time, it has considerable value as giving to us an indication of what the parties said and understood at the time. It is not, however, conclusive, and if the facts stated in that are shown to have been mistakenly stated, then what was there stated by these plaintiffs is not conclusive and the jury are at liberty to find the other way. Nevertheless, black and white testimony reduced to writing at the time when the transaction is going forward is generally regarded as being valuable in ascertaining, after the controversy has arisen, what the parties understood to be the truth at the time.

Now, gentlemen of the jury, these instructions given on the court's own motion and in pursuance of the requests of the parties, appear to cover the whole ground of the case. You must consider the evidence without the least favor for either of these parties.

It appears from the evidence that one is a corporation and the other a partnership of individuals. That circumstance cannot have the least weight in determining the question of right between them. You will ascertain what the truth is and give effect to it strictly and impartially, which ever way it costs.

Thereupon defendant's counsel excepted to the following portion of the charge of the court:

125 "If you find from the evidence that they (the plaintiffs) have not fully completed the contract, but have performed it according to its terms as far as they were able to do so, and were prevented by the unlawful interference of the defendant, then I charge you that they are entitled to recover of the defendant: first, for the number of tons that you shall find the plaintiffs have delivered to the defendant under and according to the terms of the contract, at the price named in it, to wit, sixty cents per ton, less the amount you find the defendant has paid plaintiffs upon the contract."

Defendant's counsel also excepted to the following portion of the charge of the court, given with reference to the loss of profits in the first level of the mine:

"If you find from the evidence that the plaintiffs have in good faith fairly performed the contract according to its terms as far as they could, and have been interfered with and prevented from the further performance of the contract by the unlawful interference of the defendant, then and in that case the plaintiffs are entitled to recover from the defendant all such gains and profits as they could and would have made had they been allowed to proceed and complete the contract according to its terms."

Defendant's counsel also excepted to the following portion of the charge of the court, given with reference to the first level of the mine:

"If you find that the defendant refused to receive good, merchantable ore that would yield 56 per cent. in metallic iron, then and in that case the defendant can not now complain, and the plaintiffs are not liable in damages for the failure to deliver the 200 tons per day stipulated in the contract."

126 Defendant's counsel also excepted to the following portion of the charge of the court:

"If you should find from the evidence that the plaintiffs were ready and had ample means to deliver 200 tons per day of good, merchantable ore from the second and third levels, yielding 58 per cent. metallic iron, and were prevented from doing so solely by the failure of the defendant to receive the ore because of want of cars; or if you find that defendant refused to receive good ore that would yield 58 per cent., then in that case the defendant can not complain, and the plaintiffs are not liable for damages for the failure to deliver the 200 tons per day stipulated in the contract."

Defendant's counsel also excepted to the following portion of the charge of the court:

"If the jury find from the evidence that during the progress of the work the defendant neglected and refused to receive the ore which the plaintiffs were ready to deliver from the first level because it had no cars in which to ship it, and such ore was good, merchantable ore, and would yield 56 per cent. metallic iron, then and in such case the plaintiffs are entitled to recover such damage as they actually sustained by such refusal and failure to take such ore."

Defendant's counsel further excepted to the following portion of the charge of the court:

"If the jury find from the evidence that the plaintiffs were in good faith endeavoring to carry out and perform said contract according to its terms, and the defendant wantonly or carelessly and negligently interfered with and hindered and prevented the plaintiffs in such performance to such an extent as to render the performance of it difficult, and greatly decrease the profits which the plaintiffs would otherwise have made, then and in such case
127 such interference was unauthorized and illegal and would have justified the plaintiffs in abandoning the contract, and would have entitled them to recover such damages as they actually suffered by being hindered and prevented from performing such contract."

Defendant's counsel further excepted to that portion of the charge of the court, given in relation to the letter of August 14, 1888, written by the plaintiffs to the defendant company at Milwaukee, stating that nearly all the ore within the terms of the contract upon the first level had been taken out, which reads as follows:

"It is not, however, conclusive, and if the facts stated in that are shown to have been mistakenly stated, then what was there stated by these plaintiffs is not conclusive, and the jury are at liberty to find the other way."

And the said court, upon the evidence and instructions aforesaid submitted the said issue to the jury, and thereupon the said jury rendered a verdict in favor of the plaintiffs and against the said defendant, in the sum of five thousand nine hundred forty-three and 79-100 dollars ($5,943.79).

And because none of the exceptions so made appear on the record of said trial, on the request of the said defendant's counsel the said district judge has settled and signed this bill of exceptions this twenty-sixth day of September, A. D. 1890, time therefor having been duly extended to this day.

HENRY F. SEVERENS,
Dist. Judge for the West. Dist. Mich.

Endorsed: Circuit court of the United States for the western dist. of Mich., nor. division. John Humble and another *vs.* Anvil Mining Co. Bill of exceptions. Filed Sept. 26th, 1890. F. M. Moon, dep. clerk. Ball & Hanscom, attorneys for defendant.

128 UNITED STATES OF AMERICA.

The Circuit Court of the United States for the Northern Division of the Western District of Michigan.

JOHN HUMBLE and JAMES JOHNS, Plaintiffs,
vs.
ANVIL MINING COMPANY, Defendant.

To the Honorable Henry F. Severns, judge of the circuit court of the United States for the said district:

Now comes the Anvil Mining Company, defendant, by Ball & Hanscom, their attorneys, and complains that in the record and proceedings, and also in the rendition of judgment in a suit between John Humble and James Johns, plaintiffs, and the Anvil Mining Company, defendant, in a plea of trespass on the case upon promises, tried in the circuit court of the United States for said northern division of the western district of Michigan, at the September term thereof, A. D. 1889, and in which judgment was rendered against the said defendant and in favor of the said plaintiffs on the sixth day of May, A. D. 1890, and in which a motion for a new trial, made by said defendant and entertained by said court, was decided adversely to said defendant on the 24th day of September, A. D. 1890, manifest error hath intervened to the great damage of the said defendant, wherefore said defendant prays for a writ of error and such other process as may cause the same to be corrected by the supreme court.

Marquette, September 27, A. D. 1890.

M. M. RILEY,
Attorneys for Defendant.

129 JAMES G. FLANDERS,
BALL & HANSCOM,
Of Counsel.

Circuit Court of U. S., N. Div., W. Dist. of Michigan.

JOHN HUMBLE and ANOTHER
vs.
ANVIL MINING COMPANY. } Petition for Writ of Error.

Filed Oct. 4th, 1890.

F. M. MOORE, *Dep. Clerk.*
M. M. RILEY,
Attorney for Defendant below.
JAMES E. FLANDERS,
BALL & HANSCOM,
Of Counsel.

[Endorsed]: Circuit court of the United States for the N. div., W. dist. of Michigan. John Humble & another *vs.* Anvil Mining Co. Petition. M. M. Riley, attorney for def'd't. Ball & Hanscom, Jas. G. Flanders, of counsel.

130 UNITED STATES OF AMERICA.

JOHN HUMBLE and JAMES JOHNS, Plaintiffs,
vs.
ANVIL MINING COMPANY, Defendant.

Know all men by these presents, that we, the Anvil Mining Company, of the State of Wisconsin, as principal, and Gage E. Tarbell, of Chicago, Illinois, and Rudolph Nunnemacher, of Milwaukee, Wisconsin, as sureties, and held and firmly bound unto the above-named plaintiffs in the sum of twelve thousand dollars, to be paid to the said plaintiffs, their executors or administrators, to which payment well and truly to be made we bind ourselves and each of us jointly and severally, and our and each of our heirs, executors and administrators, firmly by these presents.

Sealed with our seals, and dated this twenty-ninth day of September, A. D. 1890.

Whereas the above-named defendant has prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment in the above-entitled action, rendered by the circuit court of the United States for the northern division of the western district of Michigan:

Now, therefore, the condition of this obligation is such that if the above-named Anvil Mining Company shall prosecute its said writ of error to effect and answer all damages and costs if it shall fail to make good its appeal, then this obligation shall be void, otherwise to remain in full force and effect.

131 ANVIL MINING COMPANY, [SEAL.]
By G. E. TARBELL, *President.*
[SEAL.] Attest: R. NUNNEMACHER, *Secretary.*
GAGE E. TARBELL. [SEAL.]
RUD NUNNEMACHER. [SEAL.]

UNITED STATES OF AMERICA,
Eastern District of Wisconsin, } *ss:*
Milwaukee County,

Rudolph Nunnemacher and Gage E. Terbell, in said district, being duly sworn, do depose and say, each for himself, that he is worth the sum of twelve thousand dollars over and above all just debts and liabilities.

Subscribed and sworn to before me this 29th day of September, A. D. 1890.

ELIAS H. BOTTUM,
[SEAL.] *Notary Public, Mil. Co., Wis.*

I approve of the above bond and the sufficiency of the sureties thereto.

Dated Sept. 30th, A. D. 1890.

H. F. SEVERENS,
District Judge.

Endorsed: Supreme Court of the United States. Anvil Mining

Company, plaintiff in error, *vs.* John Humble and another, def'ts in error. Bond. Filed Oct. 4th, 1890. F. M. Moore, deputy clerk. Dan H. Ball, attorney for plaintiff in error.

132 UNITED STATES OF AMERICA.

The Circuit Court of the United States for the Sixth Circuit and Western District of Michigan, Northern Division.

WESTERN DISTRICT OF MICHIGAN, *ss:*

I, Charles L. Fitch, clerk of said court, do hereby certify that the annexed and foregoing is a true transcript of the records and files of the cause therein entitled; that I have compared the same with the original record and files remaining in my office, and it is a true transcript thereof and of the whole of such originals.

The original writ of error, citation and assignment of errors are also hereto annexed.

In witness whereof I have hereunto set my hand and affixed the seal of said court at the city of Marquette, in said district and division, this fifteenth day of October, A. D. one thousand eight hundred and ninety.

CHARLES L. FITCH, *Clerk.*

[SEAL.]

By F. M. MOORE, *Deputy Clerk.*

133 UNITED STATES OF AMERICA.

The President of the United States to the honorable the judges of the circuit court of the United States for the northern division of the western district of Michigan, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you, Honorable Henry F. Severens, district judge, sitting as circuit judge, between John Humble and James Johns, as plaintiffs, and the Anvil Mining Company, a corporation of the State of Wisconsin, as defendant, in a plea of trespass on the case upon promises, manifest error hath happened, to the great damage of the defendant, as by its complaint appears, we being willing that error, if any hath been made, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

134 Witness the Honorable Melville W. Fuller, Chief Justice

of the said Supreme Court, the thirtieth day of September, in the year of our Lord one thousand eight hundred and ninety.

CHARLES L. FITCH,
Clerk of the Circuit Court of the United States
[SEAL.] *for the Northern Division of the*
Western District of Michigan,
By F. M. MOORE, *Deputy Clerk.*

DAN H. BALL,
Attorney for Plaintiff in Error.

Allowed, Sept. 30, 1890.
H. F. SEVERENS,
District Judge.

WESTERN DISTRICT OF MICHIGAN, *ss:*

To the justices of the Supreme Court of the United States:

The return to this writ appears by the schedules thereunto annexed.

The answer of the judges of the circuit court of the United States for the western district of Michigan.

CHARLES S. FITCH,
[SEAL.] *Clerk of said Court.*
By F. M. MOORE, *Deputy Clerk.*

135 [Endorsed:] 280. Supreme Court of the United States. Anvil Mining Co., plaintiff in error, *vs.* John Humble & another, def'ts in error. Writ of error. Filed Oct. 4, 1890. F. M. Moore, dep. clerk. Dan H. Ball, attorney for plaintiff in error.

136 UNITED STATES OF AMERICA, *ss:*

To John Humble and James Johns, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at Washington, on the second Monday of October, A. D. 1890, pursuant to the writ of error filed in the clerk's office of the circuit court of the United States for the sixth circuit and northern division of the western district of Michigan, wherein the Anvil Mining Company, a corporation, is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry F. Severens, district judge, acting as presiding judge of the said circuit court of the United States for said district, this 30th day of September, in the year of our Lord one thousand eight hundred and ninety.

HENRY F. SEVERENS,
[SEAL.] *District Judge.*

Due service of the foregoing citation is hereby acknowledged this 7th day of October, 1890.

_____ _____,
Attorney for Plaintiffs below.

_____ _____,
Of Counsel.

137 STATE OF MICHIGAN, } ss:
County of Gogebic, }

M. M. Riley, being duly sworn according to law, says that he did, on the 9th day of October, A. D. 1890, serve a true copy of the within citation upon Thomas B. Wilson, one of the firm of Kutts & Wilson, attorneys of record for the within-mentioned John Humble and James Johns, defendants in error and plaintiffs below, by delivering the same personally to the said Thomas B. Wilson, at the city of Bessemer, in the county of Gogebic, aforesaid.

M. M. RILEY.

Sworn to and subscribed before me this 9th day of October, A. D 1890.

JAS. R. HILE,
Notary Public, Gogebic County.

STATE OF MICHIGAN, } ss:
County of Gogebic, }

I, Conrad Carlson, clerk of said county and clerk of the circuit court for the county of Gogebic, being a court of record, do hereby certify that James R. Hile, whose name is subscribed to the certificate or proof of acknowledgment of the annexed instrument, and therein written, was, at the time of taking of such proof or acknowledgment, a notary public in and for said county, duly commissioned and qualified, and duly authorized to take the same; and, further, that I am well acquainted with the handwriting of such notary, and verily believe that the signature to the said certificate or proof of acknowledgment is genuine. I further certify that said instrument is executed according to the laws of this State.

In testimony whereof I have hereunto set my hand and affixed the seal of the circuit court for said county, at Bessemer, this 10th day of October, 1890.

[SEAL.] CONRAD CARLSON, *Clerk.*

[Endorsed:] Circuit court of United States, N. div., W. dist. of Michigan. John Humble & another *vs.* Anvil Mining Co. Citation. M. M. Riley, att'y for def't. Ball & Hanscom, Jas. G. Flanders, of counsel.

138 United States of America, the Supreme Court.

THE ANVIL MINING COMPANY, Plaintiff in Error,
vs.
JOHN HUMBLE and JAMES JOHNS, Defendants in Error. } In Error.

Of the October term, in the year of our Lord one thousand eight hundred and ninety.

Afterwards, to wit, on the second Monday in October, in this same term, before the justices of the Supreme court of the United States, at the capitol in the city of Washington, comes the said Anvil Mining Company, plaintiff in error, by Dan H. Ball, its attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

1. In overruling objection of counsel for defendant below to the question asked by counsel for the plaintiffs below of the witness John Humble: "State, if you know, whether the firm of Johns Brothers and Company entered into a contract with the Anvil Mining Company, with reference to the iron ore contained in the mine owned and occupied by them in that range for the Anvil Mining Company."

2. In allowing said witness, John Humble, to testify, on behalf of the plaintiffs below, as to the statements made to him by the bookkeeper of the Anvil Mining Company in relation to the weigh-bills of ore shipped from the mine.

3. In overruling objection of counsel for defendant below to the question put to said witness as to what quantity of ore the plaintiffs were capable of placing in the skip by reasonable effort and the common mode of work.

139 4. In overruling the objection of counsel for defendant below to the question put to said witness: "What reason can you give why you did not place in the skip the average of two hundred tons per day?"

5. In overruling the objection of counsel for defendant below to the question put to the same witness: "State whether or not the men lay idle during the month of May from want of cars."

6. In overruling the objection of counsel for defendant below to the question asked the said witness by plaintiff's counsel: "What was there as to the number of cars and number of tons?" relating to the contents of a certain paper concerning which the witness testified.

7. In overruling the objection of counsel for defendant below to the question put to the said witness by the plaintiff's counsel as to the amount of profits accruing to the plaintiffs for mining and putting in the skip the ore that they did mine, and allowing the witness to testify to such profits, as a means of arriving at the profits they might have made in taking out the ore which they allege they had been prevented by the defendant below from taking out.

8. In overruling the objection of counsel for defendant below to the question put to the witness, James Johns, by plaintiff's counsel: "Did he (Bennett) have anything to say at that time about getting the stock run down, making heavy assessments and bidding it in?" and in allowing the testimony of the witness on that subject.

9. In refusing to rule and instruct the jury that the written contract, introduced in evidence as modified, required all ore that should be taken out of the mine thereafter under that contract, no matter from what part of the mine, should contain at least 58 per cent. metallic iron.

140 10. In ruling and holding, in regard to the construction of the supplemental contract, which was added to the original contract between the parties, under date of July 10, 1888, as follows: "That the contract should be construed to mean that the ore extracted under this supplementary contract should contain at least fifty-eight per cent., and that it was not within the minds of the parties to stipulate in this supplementary contract that what ore might be thereafter produced from the first level should be of the grade of fifty-eight per cent."

11. In refusing to charge the jury, on request of counsel for defendant below, as follows: "There can be no allowance to the plaintiffs as damages for stoppage of their work under the contract, if they were stopped, of loss of profits they might have made by further prosecution of the work thereunder."

12. In refusing to charge the jury, upon the request of the counsel for the defendant below as follows: "There is no evidence from which the jury can find that any definite quantity of ore in addition to what was taken out by the plaintiffs, of the grade required by the contract, could have been taken out by them at a profit. Such profits would be altogether too contingent, uncertain and speculative to be allowed as damages in this suit."

13. In refusing to charge the jury, upon request of counsel for defendant below, as follows: "There is no evidence from which the jury can find that the plaintiffs were prevented by the defendant from taking out all the ore they were entitled to take out under their contract."

14. In refusing to charge the jury, upon request of counsel for the defendant below, as follows: "If the plaintiffs refused or neglected to take out all the ore required by the contract
141 to be taken out by them, but mined only such part thereof as could be mined by them at least expense, leaving that which could be mined only at a greater expense, they are not entitled to the contract price for such as they did mine, but only to the reasonable price for such as they did take out, and their claim for ore actually taken out must be reduced to such sum as would be a reasonable compensation therefor. If the amount paid them is equal to such reasonable compensation for all the ore mined by the plaintiffs, they are not entitled to recover anything further."

15. In refusing to charge the jury, upon request of counsel for the defendant below, as follows: "There is no evidence that the plaintiffs were stopped or prevented by the defendant from completing their contract, and no damages can be allowed on that account."

16. In charging the jury as follows: "If you find from the evidence that they (plaintiffs) have not fully completed the contract, but have performed it according to its terms as far as they were able to do so, and were prevented by reason of the unlawful interference of the defendant, then I charge you that they are entitled to recover of the defendant, first, for the number of tons that you shall find the plaintiffs have delivered to the defendant under and

according to the terms of the contract at the price named in it, to wit, sixty cents per ton, less the amount you find the defendant has paid plaintiffs upon the contract."

17. In charging the jury, with reference to loss of profits in the first level of the mine, as follows: "If you find from the evidence that the plaintiffs have in good faith fairly performed the contract according to its terms, as far as they could, and have been
142 interfered with and been prevented from the further performance of the contract by the unlawful interference of the defendant, then and in that case the plaintiffs are entitled to recover from the defendant all such gains and profits as they could and would have made had they been allowed to proceed and complete the contract according to its terms."

18. In charging the jury, with reference to the first level of the mine, as follows: "If you find that the defendant refused to receive good merchantable ore that would yield 56 per cent. in metallic iron, then and in that case the defendant can not now complain, and the plaintiffs are not liable in damages for the failure to deliver the two hundred tons per day stipulated in the contract."

19. In charging the jury as follows: "If you should find from the evidence that the plaintiffs were ready and had ample means to deliver 200 tons per day of good merchantable ore from the second and third levels, yielding 58 per cent. metallic iron, and were prevented from so doing solely by the failure of the defendant to receive the ore because of want of cars, or if you find that defendant refused to receive good ore that would yield 58 per cent., then in that case the defendant can not complain, and the plaintiffs are not liable for damages for the failure to deliver the 200 tons a day stipulated in the contract."

20. In charging the jury as follows: "If the jury find from the evidence that during the progress of the work the defendant neglected and refused to receive the ore which the plaintiffs were ready to deliver from the first level because it had not cars in which to ship it, and such ore was good, merchantable ore and would yield 56 per cent. metallic iron, then and in such case the
143 plaintiffs are entitled to recover such damage as they actually sustained by such refusal and failure to take such ore."

21. In charging the jury as follows: "If the jury find from the evidence that the plaintiffs were in good faith endeavoring to carry out and perform said contract according to its terms, and the defendant wantonly or carelessly and negligently interfered with and hindered and prevented the plaintiffs in such performance to such an extent as to render the performance of it difficult, and greatly decrease the profits which the plaintiffs would otherwise have made, then and in such case such interference was unauthorized and illegal and would have justified the plaintiffs in abandoning the contract, and would have entitled them to recover such damages as they actually suffered by being hindered and prevented from performing such contract."

22. In charging the jury with reference to the letter of August

14, 1888, written by the plaintiffs to defendant company at Milwaukee, stating that nearly all the ore within the terms of the contract upon the first level had been taken out, as follows: "It is not, however, conclusive, and if the facts stated in that are shown to have been mistakenly stated, then what was there stated by these plaintiffs is not conclusive, and the jury are at liberty to find the other way."

23. There is also error in this, that by the record aforesaid it appears that the judgment aforesaid was given for the said plaintiffs below and against the said defendant below, whereas, by the law of the land the said judgment ought to have been given for the said defendant below and against the said plaintiffs below; and the said plaintiff in error prays that the said judgment may be re-
144 versed, annulled, and altogether held for naught, and that it may be restored to all things that it has lost by occasion of the said judgment, etc.

DAN. H. BALL,
Attorney for Plaintiff in Error.

Endorsed on cover: Case No. 14,371. W. Michigan C. C. U. S. No. 323. The Anvil Mining Company, plaintiff in error, *vs.* John Humble and James Johns. Filed October 21, 1890.

Office Supreme Court U. S.
FILED.
MAR 9 1894
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1893.

THE ANVIL MINING COMPANY,
Plaintiff in Error.
v.
JOHN HUMBLE and
JAMES JOHNS,
Defendants in Error.

No. 323.

BRIEF FOR PLAINTIFF IN ERROR.

DAN H. BALL,
Attorney for Plaintiff in Error.

JAS. G. FLANDERS,
Of Counsel.

MARQUETTE:
MINING JOURNAL CO. (LIMITED) PRINTERS.
1894.

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 323.

THE ANVIL MINING COMPANY,
Plaintiff in Error.
v.
JOHN HUMBLE and
JAMES JOHNS,
Defendants in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF CASE

This is an action for damages for alleged breach of contract.

The plaintiffs below, in their declaration, set up a contract whereby they agreed with the Anvil Mining Company to mine, remove and load into skips, all the merchantable iron ore contained on or above the first level of the mine of said company, at its No. 1 shaft; to remove the ore by what is called the caving system, and to take out at least seventy-five per cent of the merchantable ore on said level, and so conduct the work as not to interfere with the future working and

development of the mine; to work the mine to its full capacity, remove the ore without unnecessary delay, and to take out from said level not less than 200 tons per day.

If it should be determined by the mining company that the caving system of mining was suitable for the lower levels, the mining company was to have the right, *at its option*, to extend the contract to the second and third levels.

The mining company was to have the right to terminate the contract at any time *when it should decide* that said system was prejudicial to the future welfare and development of the mine, in which case equitable compensation was to be made by the company, to be determined by referees, whose decision should be final and conclusive, as to the compensation to be made on the termination of the contract.

The ore to be taken out under the contract was to be merchantable iron ore, containing not less than 56 per cent. of metallic iron, no lower grade to be accepted by the company.

The ore was to be hoisted by the company. The mining company was to have the right to superintend and direct the work, and see that the work was so done as not to be prejudicial to the future working of the mine.

The mining company was to pay 60 cents per ton of 2240 pounds for the ore so mined by the plaintiffs, the amounts to be determined by the weights of the railroad company over whose road the ore was shipped away.

They allege that they commenced working under this contract and were engaged in said work from May 8th to July 12th, 1888, during which time they were hindered and delayed by the neglect and refusal of

of the mining company to *furnish cars for the removal of the ore* as fast as they could mine it, and *to hoist the ore when placed in the skip*, and by the company dumping large quantities of the ore after it had been mined and placed on cars.

They also allege neglect of the company *to make drifts and cross-cuts*, to do *timbering*, to *lay tracks for running cars*, to furnish sufficient surface men to attend to signals for hoisting ore and to unload the ore when hoisted, for all of which they claim damages; and that on the 12th day of July, 1888, the company stopped the work and prevented them from carrying out their contract, although they have been at all times and still are ready to proceed with the same, whereby they have lost large profits that they might have made under the contract.

In another count they allege the making of *another* contract, on July 23, 1888, precisely like the one above alleged, with the addition that the contract was to extend to the second and third levels of the mine, and that the merchantable ore extracted should contain at least 58 per cent. of metallic iron.

They allege that they were engaged in mining under this contract from July 23 to October 16, during which time they complain of the same kind of hindrance and interference on the part of the company as under the first contract, and that on October 16 they were stopped by the mining company, and deprived of profits that they might have made by carrying out the contract.

Another contract, for sinking a shaft, is alleged, but it is not material to the case as brought before this court. (Rec. pp. 6 to 13).

The mining company pleads the general issue, and gives notice of claim for damages by way of recoup-

ment for failure to perform the contract in workmanlike manner, and for caving in and greatly injuring the mine for future working; for failure to take out 200 tons per day; for failure to take out 75 per cent. of the ore, as required by the contract, and caving it in and mixing it up with other material and debris, so as to ruin it, and make it impossible to take it out profitably (Rec. pp. 21 to 24).

The contract was put in evidence, and appears on pages 34 to 37 of the printed record. It does not differ materially from the contract as alleged, except that there were not two contracts at all. There was a contract executed May 1, 1888, as set forth in the declaration, which, after running until July 10 (according to the date appearing thereon), was on that day modified in two particulars by written memoranda added thereto, signed by the parties.

First. It was to extend to and include the ore "contained on and above the second and third levels;" and

Second. The merchantable iron ore extracted under said contract was to contain at least 58 per cent of metallic iron.

The evidence shows that the plaintiffs below commenced work under the contract, and continued until about July 10, when the modification of the contract was made, and that they kept on thereafter until October 11, when they quit work. They claim that they were stopped by the mining company; and the company claims that they stopped of their own accord.

The plaintiffs gave evidence tending to show that on several occasions the mining company refused for one or two days at a time to accept the ore, claiming that the ore they were producing was not of the quality required by the contract. *In no case did the plaintiffs show, or give evidence tending to show, that the ore that*

the mining company refused to accept was of the grade required.

The evidence given by the mining company tended to show that the mine was worked in such a reckless manner as to destroy the mine on the several levels worked, and to cave in the ore, rock, surface dirt, timber and debris, in such a manner that the ore could not be separated from the other substances and taken out except at a greatly increased cost, and much of it not at all.

There was no evidence tending to show that there was any ore left in the second and third levels that could be taken out, that contained 58 per cent of metallic iron; but the evidence all tended to show that there was not.

As to the first level, the evidence of the *defendant* below tended to show that there was 15,000 to 20,000 tons of ore left, containing over 56 per cent of metallic iron, but that it was so mixed up with debris, by the caving of the mine, that most of it was lost, and none could be taken out except at much greater expense than would have been required by proper mining in the first place.

The claim of the plaintiffs below was that the reason why the ore was not taken out from the first level was that the defendant refused to hoist it after plaintiff caved it down, claiming it was not up to grade. *They gave no evidence tending to show that the ore they were taking out and sending up from the first level, and that defendant refused to accept, was of the standard required.*

ERRORS RELIED ON.

We insist that there was error in the following rulings:

1. In receiving the testimony of the witness John Humble, as to the statements made to him by the bookkeeper of the Anvil Mining Company, in relation to way-bills of ore shipped from the mine, to the effect that the said book-keeper told the witness that Mr. Bennett's orders were to lock the way-bills in the safe and keep them, and give the account of ore shipments from the books (2nd assignment of error, Rec. p. 39).

2. Receiving testimony of the witness Humble, as to the number of cars and number of tons of ore, appearing in a written statement which he had obtained from the bookkeeper, of ore mined during the months of August and September, which testimony was to the effect that said statement showed 98 cars containing 1885 tons shipped in August, and 128½ cars containing 1873 tons shipped in September.

(6th assignment of error, Rec. p. 43.)

3. Receiving testimony of said witness Humble, as to the amount of profits accruing to the plaintiffs from mining and delivering into the skip the ore that they did mine, for the purpose of arriving at the profits they might have made by taking out the ore which they claim to have been prevented by defendant from taking out, which testimony was to the effect that, by taking the amount of money received for the ore mined during the first month, when they were not interfered with or delayed, only waiting for cars, and dividing it among the men that were working, and the amount of ore put out, and what they put out each day, and what the cost was for that amount for the month, he

ascertained that the cost of getting out the ore was 30 cents per ton.

(7th assignment of error, Rec. pp. 43, 44.)

4. Receiving the testimony of the witness James Johns, in relation to an alleged conversation with Mr. Bennett, the superintendent, wherein the witness testified as follows: "He said if we struck a good thing on the bottom level to keep it quiet, and they would call an assessment and buy in the stock; could make some money out of it and get the stock for the assessment."

(8th assignment of error, Rec. pp. 52, 53.)

5. In refusing to rule and instruct the jury that the written contract introduced in evidence, as modified, required that ore that should be taken out of the mine thereafter under that contract, no matter from what part of the mine, should contain at least 58 per cent. of metallic iron.

(9th assignment of error, Rec. pp. 65, 66.)

6. In ruling and holding, in regard to the supplemental contract, appended to the original contract between the parties, under date of July 10, 1888, as follows: "The contract should be construed to mean that the ore extracted under this supplementary contract should contain at least 58 per cent, and that it was not within the minds of the parties to stipulate in this supplementary contract that what ore might thereafter be produced from the first level should be of the grade of 58 per cent."

(10th assignment of error, Rec. p. 66.)

7. Refusing to charge the jury, upon request of counsel for defendant below, as follows:

"There can be no allowance to the plaintiffs as damages for stoppage of their work under the contract, if

they were stopped, for loss of profits they might have made by the further prosecution of the work thereunder."

(11th assignment of error, Rec. p. 66.)

8. Refusing to charge the jury, upon request of counsel for defendant below, as follows:

"There is no evidence from which the jury can find that any definite quantity of ore, in addition to what was taken out by the plaintiffs, of the grade required by the contract, could have been taken out by them at a profit. Such profits would be altogether too contingent, uncertain and speculative to be allowed as damages in this suit."

(12th assignment of error, Rec. p. 66.)

9. Refusing to charge the jury, upon request of counsel for defendant below, as follows:

"There is no evidence from which the jury can find that the plaintiffs were prevented by the defendant from taking out all the ore they were entitled to take out under this contract."

(13th assignment of error, Rec. p. 66.)

10. Refusing to charge the jury, upon request of counsel for defendant below, as follows:

"If the plaintiffs refused or neglected to take out all the ore required by the contract to be taken out by them, but mined only such part thereof as could be mined by them at least expense, leaving that which could be mined only at a greater expense, they are not entitled to the contract price for such as they did mine, but only to a reasonable price for such as they did take out, and their claim for ore actually taken out must be reduced to such sum as would be a reasonable compensation therefor. If the amount paid them is equal to such reasonable compensation for all the ore mined

by the plaintiffs, they are not entitled to recover anything further."

(14th assignment of error, Rec. p. 66.)

11. In refusing to charge the jury, upon request of counsel for defendant below, as follows:

"There is no evidence that the plaintiffs were stopped or prevented by the defendant from completing their contract, and no damages can be allowed on that account."

(15th assignment of error, Rec. p. 67.)

12. In charging the jury as follows:

"If you find from the evidence that they, plaintiffs, have not fully completed the contract, but have performed it according to its terms as far as they were able to do so, and were prevented by reason of the unlawful interference of the defendant, then I charge you that they are entitled to recover of the defendant, first, for the number of tons that you shall find the plaintiffs have delivered to the defendant, under and according to the terms of the contract, at the price named in it, to-wit 60 cents per ton, less the amount you find the defendant has paid plaintiffs upon the contract."

(16th assignment of error, Rec. p. 70.)

13. In charging the jury, in reference to loss of profits in the first level of the mine, as follows:

"If you find from the evidence that the plaintiffs have in good faith fairly performed the contract according to its terms, as far as they could, and have been interfered with and been prevented from the further performance of the contract by the unlawful interference of the defendant; then and in that case the plaintiffs are entitled to recover from the defendant all such gains and profits as they could and would have made had they been allowed to proceed and complete the contract according to its terms."

(17th assignment of error, Rec. p. 70.)

14. In charging the jury, with reference to the first level of the mine, as follows:

"If you find that the defendant refused to receive good and merchantable ore, that would yield 56 per cent in metallic iron, then and in that case the defendant cannot now complain, and the plaintiffs are not liable in damages for the failure to deliver the 200 tons per day stipulated in the contract."

(18th assignment of error, Rec. p. 71.)

15. In charging the jury as follows:

"If you should find from the evidence that the plaintiffs were ready and had ample means to deliver 200 tons per day of good and merchantable ore, from the second and third levels, yielding 58 per cent metallic iron, and were prevented from so doing solely by the failure of the defendant to receive the ore, because of want of cars; or if you find that defendant refused to receive good ore that would yield 58 per cent, then in that case the defendant cannot complain, and the plaintiffs are not liable for damages for the failure to deliver the 200 tons per day stipulated in the contract."

(19th assignment of error, Rec. p. 71.)

16. In charging the jury as follows:

"If the jury find from the evidence that during the progress of the work the defendant neglected and refused to receive the ore which the plaintiffs were ready to deliver from the first level, because it had no cars in which to ship it, and such ore was good merchantable ore, and would yield 56 per cent metallic iron, then and in such case the plaintiffs are entitled to recover such damages as they actually sustained by such refusal and failure to take such ore."

(20th assignment of error, Rec. p. 72.)

17. In charging the jury as follows:

"If the jury find from the evidence that the plaint-

iffs were in good faith endeavoring to carry out and perform said contract according to its terms, and the defendant wantonly or carelessly and negligently interfered with and hindered and prevented the plaintiffs in such performance, to such an extent as to render the performance of it difficult, and greatly decrease the profits which the plaintiffs would otherwise have made, then and in such case such interference was unauthorized and illegal, and would have justified the plaintiffs in abandoning the contract, and would have entitled them to recover such damage as they actually suffered by being hindered and prevented from performing such contract."

(21st assignment of error, Rec. p. 72.)

18. In charging the jury, with reference to the letter of August 14, 1888 (found on p. 60 of the printed record), written by the plaintiffs to the defendant company at Milwaukee, stating that nearly all the ore within the terms of the contract upon the first level had been taken out, as follows:

"It is not however, conclusive, and if the facts stated in that are shown to have been mistakenly stated, then what was there stated by these plaintiffs is not conclusive, and the jury are at liberty to find the other way."

(22nd assignment of error, Rec. p. 74.)

BRIEF OF ARGUMENT.

I.

The contract sued upon was by its terms liable to be terminated. Neither party was bound to continue it, and neither would be entitled to damage against the other for terminating it, except compensation as provided by the terms of the contract.

This point was raised by way of objection to evidence of damage from the alleged stoppage of work under the contract by the defendant below (Rec. p. 44.), and is covered by the 7th assignment of error (Rec. p. 82.)

The right was reserved by the mining company, in the contract, to terminate it whenever *it should decide* that the system of mining was injurious to the mine. That was left entirely with the company to determine (Rec. p. 35). Its decision was conclusive. As it had the power to stop the work at any time, the plaintiff, of course, had the same right. They could not be bound to continue the work, while the company was at liberty at any time to decide that the system was prejudicial, and stop the work.

Finley Shoe & Leather Co. v. Kurtz, 34 Mich. 90.
Wilkinson v. Heavenrich, 58 Mich. 574.
U. & S. R. R. Co. v. Brinkerhoff, 21 Wend. 139.
Lester v. Jewett, 12 Barb. 502.
Dorsey v. Packwood, 12 How. 126-136.

A special provision was made for compensation to the plaintiffs, in case the mining company should exercise its right to terminate. No such compensation or damages can be claimed by them until ascertained in in the manner so provided.

If this position is correct, every instruction given to

the jury, allowing them under any supposed state of facts, to give a verdict for loss of profits, or damages on account of the stoppage, was erroneous.

II.

After the modification of the contract, July 10, all the ore to be taken out under the contract, from any part of the mine, was required to contain 58 per cent. of metallic iron.

The principal claims of the plaintiffs below for damages were, 1st, for being hindered and delayed in their work by the refusal of the defendant to hoist and accept the ore they mined; and, 2nd, from being prevented from completing the contract, and from mining the rest of the ore on the first second and third levels of the mine.

In order to recover on either of these claims it was necessary to show that the ore rejected, and the ore that they were prevented from taking out, was of the grade required by the contract.

The court ruled that there was no evidence from which the jury could find any amount of ore in the lower levels of the required grade—58 per cent—that the plaintiffs were prevented from mining; but left for them to say whether there was any in the first level.

But he instructed the jury that the ore in the first level was only required to be 56 per cent ore, after, as well as before, the modification of the contract. (Rec. p. 65.)

The agreement added to the contract under date of July 10 (Rec. p. 37) was considered by the court to be

a "supplementary contract", instead of a modification of the original contract.

It does not purport to be a new contract. It is agreed by the "parties to the *within agreement* that *this contract* shall extend" etc., "with the exception that the merchantable iron ore extracted under *this contract* shall contain at least 58 per cent or upwards of metallic iron."

The expression "this contract" is used twice. It cannot be supposed to have two different meanings in the same sentence. No contract is referred to except the one to which this memorandum is appended, and it is under *that contract* that ore produced thereafter must contain 58 per cent of metallic iron.

The plaintiffs had not been stopped from mining in the first level, but about July 12 they were informed by the superintendent of the mining company that unless they agreed to a modification of the contract, raising the grade to 58 per cent, it would not be extended below the first level. (Rec. p. 41.)

Plaintiffs, then, or, according to their testimony, about the 23rd of July, agreed to the modification of the contract, and signed the memorandum.

The contract had not been terminated by either party, but it was modified, and continued in force.

There was *no evidence* that any 58 per cent ore that could be taken out remained in the first level (except a little in the narrow foot wall lens), but there was evidence that there was some 56 per cent ore. (Rec. p. 62.)

No verdict on account of damages—loss of profits—could have been found, for ore the plaintiffs were prevented from taking out, if the jury had been instructed that it was required to contain 58, instead of 56 per cent, or at least, it is fair to suppose it must have been much smaller.

The verdict was $5,943.79. The only claim made in the testimony of plaintiffs, aside from this kind of damages, was for ore mined and not paid for $1,410, and for loss of time by delays $726.83, in all $2,136.83 (Rec. pp. 49 and 50), so that there must have been included between $3,000 and $4,000 for loss of profits.

We submit that there was error in the ruling of the court in this respect.

III.

Under the facts in this case the damages claimed for loss of profits were too uncertain, contingent and conjectural to found a verdict upon.

The mine consisted of two veins or "lenses" of ore, the south, or foot wall vein being about five or six feet in width (Rec. p. 47), which contained ore of a higher grade than the other; separated from it by 40 feet of rock was another belt, 60 feet in width, of an inferior grade of ore. It was this larger body of ore that the plaintiffs have reference to in their testimony of ore left, that they were prevented from taking out. (Rec. p. 42.)

This ore the plaintiffs were to take out by the caving system. This system was explained by the plaintiff in this way: (Rec. p. 40.)

"The process of caving is to take a portion of ground, cut it up into blocks, leave small pillars, then drill a hole in each of these pillars, charge it with an explosive and blow it all out, and let the ore come right down towards you. After we had cut up our ground we would put a *shoot* (chute) in below where we were going to cave, and when we would take out those pillars

we would run this ore through that *shoot*, and if the dirt come we would close that *shoot* and leave it."

They depended on being able to *draw off* the ore through chutes, as they would draw off a liquid, and when the dirt and other material, that must cave down with the ore, began to come, they proposed to close it up and leave the rest there. How it could be determined with any reasonable degree of *probability* that they would be able to get any particular percentage of ore, free from said rock and other material, it is difficult to see.

It is hardly possible that *such a system* of mining could ever be adopted—or that this could be what is called the "caving system" of mining, but it is the system the plaintiffs used, and by it their work must be judged.

At the time they commenced, there had been mined out on the first level, a body of ore about 27 feet high, and four or five "sets" in length and the same in width. The "sets" referred to were timbers set up, each set consisting of two posts and a cap, and two other posts and a cap nine feet distant, with cross timbers connecting, so that each set was nine feet square, and nine feet high (Rec. p. 45). These sets were erected for the support of the mine in the place of the ore taken out.

From these sets they would open out small rooms, then blast out the pillars and let the ore come down.

They made several caves in that way, much of the ore brought down being so poor that the mining company would not accept it, and it was left in the mine. (Rec. pp. 45, 46.) The last cave on the first level (which is the only level that needs to be considered in this connection), was made June 29, which "brought down the whole *surface* into the mine" (Rec. p. 46). It filled up the timbers, and broke down part of the room.

The condition of the first level after this cave is further described by Tarbell, witness for the defendant below, on page 56 of the record, showing that ore, rock, sand, boulders and timber were mixed up, and filled the entire level, so that they could get in only a few feet from the shaft.

The witness Humble, one of the plaintiffs, at page 50 of the record, testifies that "the ore in this mine was streaked with sand and other stuff besides ore. That when the ore was caved down in the way described, the sand gets mixed up with the ore. In some parts of the mine was *streaks of ore and sand* five and six inches, and some parts of it was clean ore."

The witness Johns, also one of the plaintiffs, at pages 51 and 52, testifies to the streaks of sand among the ore *all through the mine*, and that when the *big cave* in the first level, about the last of June, was made, it filled up the level so that they could not get into it *for a long time*. He saw sand and stones among it, that *came down from the surface*. He thinks they could have taken it out by getting in and timbering it up, but he doesn't know whether it was 56 per cent ore or not (Rec. p. 52).

In fact he could not tell whether any of the ore left was up to 56 per cent or not (Rec. p. 51).

Humble testifies (p. 47) that he does not know what the ore left in the mine will assay. He states that some from the *third level* assayed 56.13 per cent, but under the ruling of the court that is not material.

In view of all these facts, there was nothing tangible or reasonably certain, on which to estimate profits that might have been made in taking out more ore from the first level.

"The plaintiff's right to recover for such a loss depends on his proving with sufficient certainty that

such advantages would have resulted, and therefore that the act complained of prevented them."

(1 Sutherland on Damages, Sec. 59, Mar. p. 197.)

It is a common saying among miners, and a true one, that you cannot see into the ground. Men may know the length of a lens of ore, between two shafts or openings that may be made in it, and also the depth at the points penetrated; and they may *suppose* that it holds its shape, size and quality between those points. But it is mere conjecture. There were irregular seams of sand in the ore, of varying thickness up to 5 or 6 inches. How much there was of this there is no means of even estimating. When blasted down, the soft crumbly ore of this mine would become mixed with the sand and rock, so as to make much of it worthless. How much of it would be so spoiled, particularly by the peculiar method of caving adopted by the plaintiffs, is purely matter of conjecture. Whether any profits could be made on any ore left in the mine—or rather, whether any profit could be made in *taking out all the ore of the required quality*, whether 56 or 58 per cent. on the first level, depended on so many unknown and uncertain conditions, that no *estimate* could be made of it, nor could any verdict be given therefor other than one based on pure guess work.

McKinnon v. McEwan, 48 Mich. 106.
Allis v. McLean, 48 Mich. 428.

IV.

There was no evidence that the plaintiffs were stopped and prevented from going on under their contract, at least on the first level.

The damages on this ground were limited by the court to this level.

The allegation in the declaration, on which this claim is based is this:

"The said defendant * * * on, to-wit, the 12th day of July A.D. 1888, refused and prevented the said plaintiffs from proceeding further in the carrying out of said contract on their part, and has from thence hither wholly prevented said plaintiff from carrying out on their part the terms and conditions of said contract." (Rec. p. 10.)

The first evidence given by the plaintiffs below which is claimed as tending in that direction, is the conversation between Bennett and Humble, relative to the extension of the contract to the lower levels (Rec. p. 41), and the letter of Bennett, superintendent, to the plaintiffs, dated July 12, 1888, which appears on the same page.

There is nothing in all this that can be tortured into a stoppage of the contract on the first level. It was optional with the company to extend it to the lower levels or not. The plaintiffs were notified that it would not be extended, unless they consented to the modification of the contract, so as to raise the grade to 58 per cent. Humble at first refused, and the engineer was directed not to run the skip to the *second* level any more.

After some days of refusal, the plaintiff finally consented to the modification, and the contract, as modified, was extended to the lower levels.

Afterwards, in August, Humble claims he was hindered by refusal to accept ore on account of its poor quality, but there is no claim of final stoppage until October 11.

Mr. Humble claimed to have been stopped on the 3rd of October, by an inferior mining boss (Rec. p. 43); although the company's superintendent when he first

heard of it told Humble he had given no such orders. Humble seemed inclined to insist on being stopped.

On the next day the Mining Inspector of the county, an official who is charged with the duty of examining mines, and ordering such safeguards as he deems necessary to protect the miners, examined the mine, and directed certain timber work to be put in on the first level, near the shaft, in the narrow foot wall lens, and forbade the breaking of any more ground in there until it was done. (Rec. pp. 47, 48.) The plaintiffs were notified of the requirement, but they did not do the work required, and they *abandoned* mining there. (Rec. p. 49.)

They waited until the 9th of October to get some assays of the ore made. Humble does not tell what his assays showed, but they went to work again on the 9th.

The testimony of C. M. Boss (pp. 62 and 63), the expert who examined the third level, sampled it and made assays, *at the request of the plaintiffs below*, shows that except in the small foot wall lens, there was no ore that would assay 58 per cent, but they were trying, with consent of the company's superintendent, to mix it with the ore from the foot wall lens, so as to bring it up to that grade (Rec. p. 49). They worked from October 9 to October 11. On that day, Humble testifies that Bennett directed them to stop *in the third level altogether*. The witness goes on: "Well", says I, "you mean to bring our tools out?" "Yes," says he, "you can run what ore you have broken in the first level and quit."

They took out what they had broken on the foot wall lens, and there was no more left there to break.

Bennett denies ordering them to quit at any time (p. 62).

The plaintiffs' own testimony does not show that they were stopped from working on the first level. When they were directed to stop in the third level, they recognized the fact that there was nothing more to get in the first level, so said: "You mean to bring our tools out?"

If this can be called a stoppage of work on the first level, it is not the stoppage alleged in the declaration —July 12—nor under such a contract as alleged, for taking out ore that would assay 56 per cent of metallic iron.

V.

There is absolutely no evidence to show that there remained any ore containing fifty-eight per cent of metallic iron, on the first level, that could have been taken out.

We have called attention to this before in another connection. The refusal of court to charge, as complained of in the 13th and 15th assignments of error, and the charge of the court as mentioned in the 16th and 17th assignments of error, were erroneous for that reason.

VI.

The facts assumed by the court in the charge, as complained of in the 18th and 19th assignments of error, were not supported by the evidence.

The charge with reference to the *first level* (18th assignment, p. 71) was that if the defendant refused

to receive merchantable ore that would yield 56 per cent. metallic iron, the defendant could not complain of the failure to deliver 200 tons a day, as provided for in the contract.

We have shown, and a careful examination of the testimony, all of which is set forth in the bill of exceptions, will show, that there was *no evidence* that the company refused to receive any ore that would yield 56 per cent. metallic iron. Whenever the superintendent refused to receive ore, it was for the reason that it was too low grade, and the plaintiffs *did not attempt to show*, in any case, that it was up to the 56 per cent. standard.

The charge referred to in the 19th assignment of error (p. 71) relates to the lower levels, and is to the same effect, except that it raises the required standard to 58 per cent.

VII.

The jury were instructed that if the defendant refused to receive from the first level merchantable ore that would yield 56 per cent. metallic iron, the plaintiffs were entitled to damage for such refusal.

(20th assignment of error, p. 72.)

This is subject to the same objection as the charge referred to in the 18th assignment. There was no evidence of the fact supposed.

VIII.

The contract was entire, and if binding, required the plaintiffs to take out all the ore on the three levels, of the grade specified. The plaintiffs would not be entitled to the contract price for taking out a small part of the ore that could be most cheaply mined.

A part of the demand of the plaintiffs was for ore taken out by them, and which the mining company had refused to pay—claiming damages. This claim amounted to over $1,400.

The mining company claimed that the plaintiffs had taken out that which could be most cheaply mined, and then neglected and refused to take out the rest, and worked the mine in such a reckless manner that it could not be taken out (Rec. p. 22), and the evidence tended to support that claim.

The court was requested, on behalf of the company, to charge the jury, that if the plaintiffs refused or neglected to mine all the ore required by the contract, and only mined such as could be taken out with the least expense, leaving such as could be mined only at a greater expense, they were not entitled to the contract price for what they did take out, but only to such sum as would be a reasonable compensation therefor: and if they had already received a reasonable compensation for what ore they took out, they were not entitled to receive anything further therefor (14th assignment of error, p. 66). This was refused.

The request went on the hypothesis that the plaintiffs had violated the contract. Having violated, and refused to perform it, they were not entitled to recover under it. The contract price might have been taken

as a reasonable compensation, if the cost of taking out any ton of ore was equal to the cost of taking out every other ton. But the request supposes that this was not so. The plaintiffs claim to have been able to take out the ore they did take out for 30 cents a ton, leaving them a net profit of 30 cents a ton. If it would cost 40 or 50 cents a ton, or more, to take out what they refused to take out, in violation of the contract, they were not entitled to the *contract price* for what they mined. The price agreed upon is an average price for the whole, not the price for mining what can be mined most cheaply.

IX.

The court charged the jury substantially that if the defendant wantonly, carelessly, or negligently interfered with and hindered the plaintiffs about their work, so as to make it difficult to perform their contract, and greatly decrease the profits of it, the plaintiffs might *abandon* the contract, and still recover such damages as they suffered by being hindered and prevented from performing it.

(21st assignment of error, Rec. p. 72.)

The error was in holding that one party to a contract, in case of failure of the other party to perform it, may ABANDON (i. e. rescind) the contract, and at the same time claim damages for being prevented from performing or completing it.

In the case supposed the plaintiffs would doubtless have the right to *abandon* or *rescind* the contract—*refuse to proceed* with it, or to *continue*, under the diffi-

culties they were then wrongfully subjected to, and recover damages, *under the contract*, for the hindrance and delay. But the charge holds that a party may *rescind*—or *abandon*—a contract, and at the same time *recover for the stoppage*, on the theory that the contract remains in force.

The correct rule is stated by Justice Christiancy, in the case of *Hubbardston Lumber Co. v. Bates*, 31 Mich. 158-169, as follows:

"Plaintiff cannot rescind the contract, and then insist on damages for not performing; for where a contract is rescinded, an action will not lie for the breach of it." See also,

Van Trott v. Weise, 36 Wis. 439, 448.
Hunt v. Selk, 5 East. 249.

This instruction allowed the jury to find a verdict for the plaintiffs for loss of profits by reason of being prevented from completing the contract, even though they found that they were not stopped, provided they found that there was so much interference and hindrance by the mining company as justified the plaintiffs in *abandoning the contract.*

X.

The plaintiffs should be held bound by their letter of August 14th, stating that the ore on the first level was practically all taken out (Rec. p. 60).

The jury was instructed that this was to be taken into consideration, and that it had "considerable value as giving to us an indication of what the parties said and understood at the time."

But they were further instructed that it was not con-

clusive, and the jury were left "at liberty to find the other way."

(22nd assignment of error, Rec. p. 74.)

The occasion of writing this letter was that the superintendent of the mining company had read to the plaintiffs a letter from the general manager, complaining that so little ore had been taken out of the first level (Rec. p. 59). If it was the fault of the plaintiffs, it was not at all likely that they would be allowed to proceed with the work in the lower levels, where they appeared anxious to work, until they had gone back and finished their work in the first level. To avoid the cancellation of the contract, it was necessary for them to show why more ore had not been taken out.

They did write the letter (p. 60) explaining that, although they could get plenty of ore that would run from 30 to 55 per cent. the "commercial ore" on the first level was practically all taken out, and they did not think there was "five per cent. of commercial ore left in and above the first level." That when the directors examined it, it "showed a great deal larger than it really was. It was a mere shell."

This explanation was accepted, and the plaintiffs by means of it were enabled to go on with the work in the lower levels. The Anvil Mining Company was misled by it (if it was an untrue statement) to its injury, and the plaintiffs should not be heard to deny the truth of it, and recover several thousand dollars against the Anvil Mining Company, on the ground that the statement of the letter made by the plaintiffs for their own advantage, was a deliberate and wilful falsehood.

XI.

The plaintiff Humble was allowed, against the objection of the defendant below, to testify to statements made by defendant's bookkeeper, to the effect that the superintendent of the company had forbidden him to show the railroad way bills of the ore shipped, which were, by the contract, made evidence. (2nd assignment of error, Rec. p. 39.) There was no evidence that the book keeper was authorized to act for the company in any way. He was not an agent in any sense. He had no authority to speak for the company, and his admissions were not the admissions of the company. What he said was mere hearsay and incompetent. But it tended to prejudice the jury against the mining company, and cause them to believe that the plaintiffs were unfairly treated, and that the company was concealing from them the evidence of the quality of ore shipped.

The bookkeeper neither had authority to exhibit the way bills to plaintiffs, nor to make them any statements from the books, without special direction; nor to make any admissions for the company.

XII.

The witness Humble was allowed, against the objection of counsel for the defendants below, to testify to the *contents of a written statement* which he *obtained from the bookkeeper*, purporting to show the quantity of ore mined by the plaintiffs during the months of August and September. (2nd assignment of error, Rec. p. 43.)

As before stated, there is no evidence that the book-keeper had any authority to furnish such statements. But on this particular occasion the witness procured it from him. It would be *hearsay*, and incompetent, *even if produced*. In this case, the witness was allowed to give *oral evidence* of its contents, without producing, or accounting for, it.

XIII.

The witness Humble was allowed to testify to the profits the plaintiffs had made on mining the ore they did mine, as evidence of what they might have made on what was left. (7th assignment of error, Rec. p. 14).

This was erroneous for the reasons hereinbefore discussed, and also because past profits are no guide to what might have been made thereafter.

Masterson v. Village of Mt. Vernon, 58 N. Y. 391.

XIV.

The witness James Johns was allowed to testify that the superintendent Bennett told him "if we struck a good thing in the bottom level to keep it quiet, and they would call an assessment and buy in the stock; could make some money out of it, and get the stock for the assessment".

This testimony could have had no other object than to impeach Bennett, who was a witness in the case. It has no bearing whatever on the issue. Its purpose was to make the jury believe that Bennett was

engaged in a dishonest conspiracy to defraud the stockholders, and so affect his credibility.

It needs no argument to show that this testimony was not allowable for that purpose, and that it was entirely irrelevant for any other purpose.

I submit that the judgement should be reversed.

DAN H. BALL.

Attorney for Plaintiff in Error.

Office Supreme Court U. S.
FILED.
MAR 17 1894
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1893.

THE ANVIL MINING COMPANY,
PLAINTIFF IN ERROR,

vs.

JOHN HUMBLE AND JAMES JOHNS,
DEFENDANTS IN ERROR.

No. 323.

BRIEF FOR DEFENDANTS IN ERROR.

EDWIN F. UHL,
Counsel for Defendants in Error.

FRANK KUTTS,
Attorney for Plaintiffs.
BIRNEY HOYT,
of Counsel.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS
1894.

Supreme Court of the United States.

OCTOBER TERM, 1893.

THE ANVIL MINING COMPANY,
PLAINTIFF IN ERROR,

vs.

JOHN HUMBLE AND JAMES JOHNS,
DEFENDANTS IN ERROR.

No. 323.

In error to the Circuit Court of the United States for the Western District of Michigan.

Brief for Defendants in Error.

The defendants in error were plaintiffs below. The action was begun by them and one Joseph H. Johns, copartners under the firm name of Johns Brothers and Humble.

Joseph H. Johns died after commencement of suit, and September 11, 1889, the cause was revived.

The action was brought to recover damages for the breach on the part of defendant of a certain contract in writing set forth in the declaration; the measure of damages claimed on the part of the plaintiffs being all such

sums of money or gains and profits as they might and would have made if permitted by the defendant to carry out the contract according to its terms, as well as a balance due for money actually earned under the contract and unpaid.

On and before the first day of May, 1888, the defendant owned and operated a certain iron mine in Gogebic county, Michigan, known as the Anvil Mine.

On said first day of May, the plaintiffs being practical mining men, entered into a contract with the defendant to mine and place in the skips at least seventy-five per cent. of all the ore on the first level of said mine, which would assay fifty-six per cent. metallic iron, by what is known as the "caving system," at an agreed price of sixty cents per ton, the defendant to raise the ore from the mine when placed in the skip by the plaintiffs, the defendants reserving the right to extend the contract to the second and third levels of said mine, and also reserving the right to stop the mining under said contract, *upon the sole condition, however,* that mining by the caving system, so called, should be found prejudicial to the future development of said mine, in which case equitable compensation should be made to plaintiffs in the manner specified in the contract.

A *level* in a mine is this: The miner sinks a shaft into a body of ore a certain depth, and then excavates galleries and rooms laterally in the body of ore. This is called the floor of the level. It is also the roof of the level next below, and the ore on and above the floor is the ore in any given level. In mining by what is called the "caving system," when the miner fixes the point which is to be the floor of his level, he first digs a drift or passageway from the shaft, which he descended, across the body of ore until he reaches the extremity of the ore. Along this alley or passage is laid a track, upon which small tram cars are run. The ore is first loaded in these cars, then run along

this track to the shaft and dumped into the skip for hoisting. He then excavates a small room in the ore, fixing the floor at the proper angle, and builds with plank a chute, having a narrow spout with a gate or stopper and protruding over the track spoken of. He then places explosives in proper places above said room, and, when blasted, the ore is loosened like loose sand, falls on the inclined floor of the room and rushes out through the chute into the tram cars. When the car is filled the gate is shut, that car removed, and another put in its place, and so on until the ore is all run out. This operation is repeated in the portion next adjoining, and so on continuously until the shaft is reached.

If the ore is run out at once there is no difficulty; but if permitted to remain for some time after blasting it settles, becomes compact, and will not run through the chute.

The first room is most difficult to construct, and is most distant from the shaft, hence the first ore taken out is the most expensive, and the expense grows less and less as the shaft is approached.

In this case a large amount of ore most distant from the shaft was taken out. Great hindrance and delay were suffered by plaintiffs for want of cars in which to place the ore when raised from the mine, for want of the employment by the defendant of a sufficient number of men to properly attend to hoisting the ore, &c., &c., and on six different occasions, when a room had been blasted out, the plaintiffs were stopped by the defendant's superintendent and not permitted to let the ore run through the chute, on one frivolous pretext or another, until the benefit of the work was lost; and were finally prevented by defendant from doing any more work in the first level, when there remained therein and near the shaft as much as twenty thousand tons to be taken out under the contract.

The plaintiffs recovered a verdict in the court below for

$5,943.79 damages for hindrance and delay and finally stopping plaintiffs in their work in the first level (also for ore taken out in September and October unpaid for), the court below having refused to submit to the jury any of the plaintiffs' claims relative to the second and third levels. The defendant appeals.

ASSIGNMENTS.

1. The first assignment of error relates to the overruling of defendant's objection to the question to plaintiffs' witness John Humble as follows:

"State, if you know, whether the firm of Johns Bros. & Co. entered into a contract with the Anvil Company, with reference to the iron ore contained in the mine owned and occupied by them in that range for the Anvil Mining Company."

Pages 37 and 38 of Record.

The contract had already been read in evidence and its execution admitted by both parties (page 34, Record). This was a mere question of identity of the parties. It did not purport to give the contract, but only the fact that a contract was made.

2. The second assignment relates to the overruling of defendants' objection to the testimony of said witness, as follows:

"He, the book-keeper, told me Mr. Bennett's orders were to lock those weigh-bills in the safe and keep them, and give us our account off the books."

Page 39.

The witness John Humble, one of the plaintiffs, went to the book-keeper of defendant and asked to see the weigh-bills of the ore as shipped by the car load. The plaintiffs were

entitled to see these weigh-bills, as the contract expressly provided that the amount of ore mined should be determined by the report of the railroad company (page 36).

The next day plaintiff John Humble went to the same book-keeper, and asked Mr. Bennett, defendant's superintendent, in his presence, for the weigh-bills, and Bennett replied that there was no need of it as long as they copied them off the books (page 39). It is not known why this ruling should be claimed to be erroneous.

3. The third assignment relates to the overruling of defendant's objection to plaintiffs' question to said John Humble as follows:

"What quantity of ore were they capable of placing in the skip by reasonable effort and according to the common mode of work?"

Page 39.

The answer was, 225 to 250 tons per day. This evidence was admissible to show that plaintiffs were able to put 200, tons the amount of their contract, in skips per day—to show that they were able to perform their contract; also to show the amount of damages in being hindered in doing such work.

4. The fourth assignment relates to the overruling of defendant's objection as incompetent and as calling for the conclusion of the witness instead of facts to plaintiff's question to said witness, John Humble, as follows:

"What reason can you give why you did not place in the skip the average of 200 tons a day?"

Pages 39 and 40.

The answer was—

"Well, the superintendent in the month of May didn't

interfere with us as regards hoisting the ore much, only he hadn't cars and no place to put it."

Page 40.

This question called for facts and not opinions. The answer, likewise, was of facts and not opinions. The proofs were admissible under the declaration to show that plaintiffs were prevented by defendant and hindered by defendant from fully performing the contract in that regard; also to show that defendant prevented plaintiffs from earning as much as they reasonably could have done with the men they had.

5. The fifth assignment relates to defendant's objection as leading and irrelevant to the plaintiffs' question to said witness, John Humble, as follows:

"State whether or not the men lay idle during the month of May from want of cars."

Page 40 of Record.

The answer was—

"Yes; they refused to take the ore up on account of having no cars; they wouldn't stock pile it; they didn't have any place to stock pile it that I know of."

Page 40 of Record.

This question was not in form leading, as it did not suggest the answer.

It was relevant as it was a distinct element of damage, if plaintiffs' men were idle in May because of the neglect of defendant to provide cars to move the ore as brought to the skips.

6. The sixth assignment relates to the overruling of defendant's objection to plaintiffs' question to said witness, John Humble, as follows:

"What was there as to the number of cars and number of tons?"

Page 43 of Record.

The answer was—

"The statement shows 98 cars, containing 1,885 tons, was shipped in August, and 128½ cars, containing 1,873 tons, was shipped in September, and when the book-keeper learned that I was taking down the number of cars and shipments he refused to give me any number, and said: 'That is all you can have.'"

Page 43 of Record.

This evidence refers to the statements of defendant's books of the amount shipped away, and the contract provides that the amount of ore mined and shipped shall be determined by weights, as shown by reports of railroad companies to said Anvil Company (page 36, Record).

The defendant's superintendent had refused to allow plaintiffs to inspect the weigh-bills (page 39), and had so instructed defendant's book-keeper (same page), and it seems, from the evidence on page 43, that the book-keeper had instructions to refuse all statements from the books except the number of tons shipped, thus depriving plaintiffs of the evidence of the amount of ore shipped and preventing them from comparing the number of cars shipped and the number of tons claimed by defendant to have been shipped.

The shipping books were kept and entries made by the book-keeper under the direction of Mr. Bennett, defendant's superintendent (page 57). So that the entries were made under the direction of the defendant and were admissible evidence against it.

Defendant's superintendent, Bennett, testifies that the books are correct (page 57). This witness testified from said books and their contents (page 57), and the *books were used in evidence* same page).

The objection of defendant became unimportant when the books were produced and their contents given to the jury.

7 and 11. The seventh assignment and the eleventh assignment have some points in common and will be considered together. The 7th relates to overruling defendant's objections to the question of plaintiffs to said witness, John Humble, as to the amount of profit accruing to the plaintiffs from mining and delivering in the skip the ore that they did mine, plaintiffs proposed to show what profits were realized by them upon the ore so mined for the purpose of arriving at the profits they might have made in taking out the ore which they allege they had been prevented by the defendant from removing (pages 43 and 44).

The objections were as follows:

"*First.* Because the defendant by the terms of the contract had the right at any time to terminate it, and the amount of profits that might have been made by taking out more ore, if any was to be taken out, would not be the measure of damages.

"*Second.* Because, by the terms of the contract, if the defendant should decide to terminate it the equitable damages to which the plaintiffs would be entitled were to be fixed and determined upon by arbitrators.

"*Third.* Because profits, if any, derived from taking out the ore that was actually taken out would be no index or guide to the profits that might have been made in taking out the remainder of the ore."

Page 44, Record.

The witness replied explaining the way he arrived at the cost, and testified that it cost about 30 cents per ton to take out what ore he did take out, and that it would cost less to remove what ore remained (page 44).

The eleventh assignment relates to the refusal of the

court to charge the jury as requested by defendant as follows:

"There can be no allowance to the plaintiffs as damages for stoppage of their work under the contract, if they were stopped, of loss of profits they might have made by further prosecution of the work thereunder."

Page 66, Record.

It is supposed that defendant by this request seeks to raise the same questions involved in the 1st and 2d objections above, and also whether profits are a proper measure of damages in any case.

In relation to the testimony under said question it appears that the witness testified that the ore taken out would not cost less than that which might be removed (pages 44–47).

This was the same kind of work, and the comparison was fair as giving actual facts about such work. The ore taken out was from the back part of the mine, and the cost of removal was greater than that to be taken out which was nearer the shaft (page 47).

It is a well-established rule of law that the profits which might have been realized by the performance of a contract are a just and proper measure of damages for the breach of such contract, when they can be shown with reasonable certainty. Profits will be measured by the difference between the cost of doing the work and what the party was to receive for it.

Atkinson *v.* Morse, 63 Mich. 276.
Burrell *v.* N. Y. Salt Co., 14 Mich. 34.
Goodrich *v.* Hubbard, 51 Mich. 62.
Philadelphia, &c., R. *v.* Howard, 13 Howard, 307.
United States *v.* Behan, 110 U. S. 338.
Loud *v.* Campbell, 26 Mich. 239.

In Devlin *v.* City of N. Y., 23 N. Y. S. 888, held, for breach of contract with city to clean streets, contractor to have the sale of ashes, &c., that contractor's damages would be the profits he might have made on the sale of ashes, &c., and difference between the contract price and the cost of the work unperformed.

In Corbett *v.* Anderson (Wis.), 54 N. W. R. 727, on the breach of a contract for hauling logs, held, that the plaintiff was entitled to recover as damages the amount of profits which he would have realized had he not been precluded from performance.

In Boston *v.* Henderson (Mich.), 52 N. W. R. 1020; 92 Mich. 606, in action by owner of a pile-driver because of defendant's delay in furnishing piles, the measure of damages is the actual profits plaintiff was prevented from earning by the acts complained of from earning elsewhere, and evidence of the per diem value of the machine is inadmissible.

And to same effect see—

O'Connell *v.* Hotel Co. (Cal.), 27 Pacific R. 373; 90 Cal. 515.

Crane *v.* Powell, 19 N. Y. S. 220.

Allphin *v.* Working, 32 Ill. App. 178; 24 N. E. R. 54.

Nixon *v.* Myers (Pa.), 21 Atlantic R. 670.

Dr. Harter Medicine Co. *v.* Hopkins (Wis.), 53 N. W. R. 501; 83 Wis. 309.

Henderson Bridge Co. *v.* O'Connor (Ky.), 11 S. W. 18.

Taylor M'f'g Co. *v.* Hatcher M'f'g Co., 39 Fed. 440.

In an action against a railroad company for breach of a construction contract, an instruction confining plaintiffs to

the recovery of profits which were "*certain*" was faulty, reasonable certainty alone being required.

Tennessee, &c., R. Co. *v.* Danforth (Ala.) 13 So. R. 51.

Also, in same case for breach of a construction contract, an instruction that profits which would certainly have been realized but for defendant's default were recoverable, but not those which were speculative, contingent, probable. or remote, was faulty in the use of the word "probable," since profits, reasonably probable, might be recovered.

There was very clear evidence of the profits of mining this ore per ton under the contract. See Record page 44, where John Humble explains his method of ascertaining the margin of profits, showing it to have been 30 cents per ton. He also (on page 45) gives measurements and estimates of the number of tons remaining in the first level (the amount of ore in that level being alone submitted to the jury). The witness James Johns also testifies as to the profits per ton on page 51 of Record. And both show the remaining ore could have been taken out at less expense than that which was removed. See also page 50, at which the manner of mining is explained, and it is shown that the ore first taken out was that furthest from the shaft.

The claim that this would not be a proper measure of damages, for the reason assigned by defendant's attorney (page 44, Record), that the defendant had a right, by the terms of the contract, to terminate it at any time, is not a correct statement of its legal effect (page 34); for there is no claim or proof that the system of mining used was prejudicial to the future development of the mine; nor is it anywhere claimed that the plaintiffs were prevented from carrying out their contract for any such reason.

The defendant insists the plaintiffs were not prevented from carrying out said contract by it at all (page 59).

The second ground of objection to the question, that the contract provides the method of ascertaining the damages to be paid, is untenable, for the reason that this provision of the contract only provided for compensation in case the contract should be terminated on the ground that the system of mining should be found prejudicial to the future development of the mine, and did not cover, nor was it intended to cover, a breach of the conditions of the contract itself (pages 34–35).

And there is no evidence of an election on the part of the defendant, or notice of an election, to terminate said contract for the reason that the system of mining used was prejudicial to the future development of said mine.

The provision for arbitration does not apply in case of a breach of the contract, but only in case the contract is terminated by second party electing to consider that the system of mining is prejudicial to the future welfare of the mine. No such election having been made, the arbitration clause is inoperative.

The arbitration clause is also subject to the condition that equitable compensation should be made, and that the parties should have failed to agree upon a basis for compensation. Under this provision some offer of compensation should have been made, and some effort by second party looking towards an agreement as to equitable compensation should have been made as a condition precedent to arbitration; for arbitration is provided by the contract only in case the parties failed to agree upon the basis of settlement.

Also, no arbitrator was appointed by second party to the contract, and no request for arbitration made by it. But the Anvil Company plead to the declaration, and went to trial in this cause without taking any of the preliminary steps for an arbitration, without any request for an arbitration and without objection on that ground. This was a

waiver of such provision in the contract, and a failure to make such provision operative according to the terms of the contract.

Parties to a contract cannot by stipulation in the contract oust the court of jurisdiction.

Utter *v.* Insurance Co., 65 Mich. 545.

The option to terminate the contract "when said second party shall decide that said *system of mining* (to wit, the caving system) is prejudicial to the future welfare and development of the mine" did not give the defendant the right arbitrarily to determine the contract.

It is not claimed or admitted by the defendant that it refused to permit the plaintiffs to go forward because the system of mining was prejudicial in fact. The defendant insisted by its pleading and upon the trial that the plaintiffs were not prevented from going on under the contract. They went to the jury upon the contention that the plaintiffs, and not the defendant, were guilty of a breach of the contract; that the defendant had done nothing to terminate it.

The jury found against the defendant upon this disputed question of fact. It was a question exclusively within the province of the jury. It is therefore conclusively determined upon this appeal that the defendant was guilty of a breach of the contract, and it cannot now, when defeated upon this disputed point, change front and be heard to say that the contract was legally terminated because it had decided the said system of mining was prejudicial to the future welfare of the mine.

In fact, upon the brief in this court (p. 12, Brief) in support of one contention, the defendant insists the plaintiffs were not stopped or prevented from going on.

8. The eighth assignment relates to the overruling of defendant's objection to further testimony of plaintiffs' wit

ness James Johns on the subject referred to in the question, as follows:

"Did he have anything to say at that time about getting the stock run down, making heavy assessments and buying it in?"

Page 52.

The further answer was—

"He said if we struck a good thing on the bottom level to keep it quiet, and they would call an assessment and buy in the stock; could make some money out of it, and get the stock for the assessment"

Page 53.

This testimony related to a letter written by Joseph Johns, one of the original plaintiffs, to the president of defendant's company, in the presence and at the request of defendant's superintendent, Bennett, in substance that the ore had all been taken out of the first level (page 60).

The subject-matter relating to this letter was called out by defendant on cross-examination of the witness, the letter shown to him, and a conversation on the subject inquired into. The testimony objected to was on redirect examination and was a part of the conversation called out by defendant on cross-examination.

This was admissible as being the whole conversation on such subject; it was also admissible as being in the way of explanation of the letter which was read in evidence by defendant. (See page 60.)

The testimony was material because plaintiffs claimed damages for defendant's preventing them from taking out a large quantity of merchantable ore on the first level. To meet this, defendant on cross-examination of James Johns presented him his brother's letter to Mr. Tarbell, defend-

ant's manager, stating that all merchantable ore within 5 per cent. had been removed on first level. And in such cross-examination the witness testified that the letter was written at the request of Mr. Bennett, and in his presence, and because his company had been finding fault with the ore (page 52).

The testimony objected to on re-examination explains why such letter was written, and shows that it was a false letter written at Bennett's request and for ulterior objects of his own, and that Bennett then entertained the intent to deceive his own company as to the amount of merchantable ore on the first level, as well as on the lower level if good ore should be found there, to enable him to profit at the expense of his company; or he intended to defraud plaintiffs by obtaining such a statement from them to estop them from claiming any further rights in said first level while pretending to purpose a fraud upon his own company.

All of the facts properly went to the jury to explain how it came that Joseph Johns wrote such a false letter to the manager of the company.

That the statements in the letter as to the amount of ore remaining in the first level were incorrect, see testimony of the defendant's witness Boss, on page 63, to the effect that there was left on the first level 20,000 tons of ore that would run, according to his assays, 56 to 62 per cent. metallic iron; and that of defendant's superintendent, Bennett, that there remained in the first level 15,000 to 20,000 tons of ore that would go above 56 per cent. metallic iron, and about 60 per cent. (page 62).

This witness is the same person who procured Joseph Johns to write the letter. The testimony of defendant's witness Channing shows that the iron left in first level, which was assayed, contained $62\frac{83}{100}$ per cent. of iron (page 64).

The plaintiff James Johns refused to write the letter, and it is suggested that Joseph Johns had not authority as a partner to bind his firm by such a letter, as there is no evidence that all the partners assented to it.

9. The ninth assignment relates to the refusal of the court to rule and instruct the jury as requested by the defendant as follows:

"That the written contract introduced in evidence, as modified, required all ore that should be taken out of the mine thereafter under that contract, no matter from what part of the mine, should contain at least 58 per cent. metallic iron" (page 65); and

10. The tenth assignment relates to the ruling as to the construction of the supplemental contract as follows: that

"The contract should be construed to mean that the ore extracted under this supplementary contract should contain at least 58 per cent., and that it was not within the minds of the parties to stipulate in this supplementary contract that what ore might be thereafter produced from the first level should be of the grade of 58 per cent" (page 66).

The supplementary contract is on page 37.

These two assignments of error involve substantially the same question and will be considered together (Point II, defendant's brief, p. 13).

The ruling of the court was correct.

The first contract, with limitations and details, provided that plaintiffs below should take out the ore in the first level, which contained 56 per cent. of metallic iron, and reserved the right, on the part of the defendant below, to extend the provisions of the contract to the second and third levels (page 7).

Plaintiffs worked in the first level from May 1, 1888, the

date of the contract, to the 10th of July, 1888, when the defendant below exercised its option to have the provisions of the contract extend to the second and third levels, as named in the contract, with the exception and additional provision that the ore extracted therefrom should contain 58 per cent. of metallic iron. And a subsequent agreement was signed as evidence of such election and of the new agreement contained in the exception (pages 11–37).

The provision as to 58 per cent. did not apply to the first level for the reason that it was not so expressed. The language relates only to the subject of extending the provisions of the contract to the second and third levels, and any general language should be construed as referring to the subject-matter intended to be covered by the new contract, and in regard to which a new contract was necessary. It should not be held to change the provisions of the old and binding contract, as to the first level, unless there are express and pointed words showing clearly an intention of both parties to make a radical change in the first contract. No such words were used.

The language is such as naturally and reasonably applies to the second and third levels.

The new writing provides that the old contract shall extend to the second and third levels, with the exception that the ore taken out shall be 58 per cent. iron. The rule as to an exception in a contract is that it is something taken out of a thing granted in the same instrument. It is a part of the thing previously described and not of some other thing.

1 Bouvier's Law Dic., page 491.

The rights of plaintiffs below as to the first level were fixed by the old contract, and any change of that contract would not properly be made as an exception in the new contract, which purported only to make a contract as to the second and third levels.

The defendant below in its plea treats the contract as to the first level as unchanged, and claims damages against plaintiffs for not taking out all ore running 56 per cent., and in its pleading (on page 23 of Record) affirmatively states and alleges as follows:

"That by the terms of said contract in writing the ore to be taken by said party of the first part, to wit, plaintiffs, under said contract, was to be merchantable iron ore, containing at least 56 per cent., or upwards, of metallic iron ore, * * * and that the merchantable iron ore mined by them and by them raised for shipment from the first level in said mine did not contain 56 per cent. of metallic iron, * * * nor did the said plaintiffs mine from the second and third levels, or either of them, and place in the skips ready for hoisting ore containing at least 58 per cent. of metallic iron as agreed by them in their supplemental contract made with said defendant."

This language in the defendant's pleading is a clear and formal admission of record, that the supplemental contract did not change the per cent. of iron in the ore mined in the first level from 56 per cent., as named in the original contract.

The parties, themselves, by the pleadings, and by their actions under the contract, gave a practical construction of the supplemental contract to the effect that the per cent. of iron in the ore to be taken from the first level was unchanged. Such construction by both parties should be adopted by the court.

Lyles *v.* Lesher, 7 Western Rep. (Ind.) 51.
Topliff *v.* Topliff, 122 U. S. 121.
Chicago *v.* Sheldon, 9 Wallace, 50.
Coleman *v.* Grubb, 23 Pa. St. 393.
Stone *v.* Clark, 1 Metcalf, 378.

The second agreement was not a modification of one

already existing. It was a new contract confined to the second and third levels. It was in effect a repetition of the terms and conditions of the first contract and their application to the second and third levels with the exception only of the grade of the ore to be removed therefrom. The language employed is clear.

The letter of defendant to the plaintiffs of July 12, 1888 (p. 41), is conclusive as to the then understanding of the defendant. This letter was written before the making of the second contract and as an inducement to it. It is as follows:

"ANVIL MINING COMPANY,
" BESSEMER, MICH., *July* 12, 1888.

" To Messrs. JOHNS BROS. & HUMBLE.

" GENTLEMEN: Under your contract of May 1, 1888, with the Anvil Mining Company for the extraction of ore from their mine, it is optional with the company to extend your contract to include the second level or even the third. The company are willing to so *extend* the contract as to include the second level upon a slight modification, viz., in the grade of ore to be extracted. The company desire that the grade of ore shall not fall below 58 per cent. metallic iron *for all ores taken from second level.* Until you have formally assented to this modification you will please perform no work *on second level*, and unless you notify the company of such assent within reasonable time your contract will terminate with the first level.

" Yours truly,
" D. N. BENNETT,
" *Sup't.*"

Mr. Humble testified (p. 41):

" I made a proposition to him if he would extend the contract to the second and third levels, I would do it. He wouldn't do that until after he came back from Milwaukee,

and then he agreed to extend it to the second and third levels."

It will be observed that this letter recites that it is optional with the company to extend the existing contract to the second and third levels. If the stipulated option was exercised the terms of the first contract would apply to the removal of the ore from the second and third levels in all particulars, including the grade of ore to be extracted; but the letter further recites that the company will exercise that option to extend to *the second level* with a slight modification, viz., in the grade to be extracted. The company desire that the grade of ore shall not fall below 58 per cent. metallic iron *for all ores taken from the second level.*

The plaintiffs are here informed that the option will not be exercised except upon the modification as to the grade of ore from the second level.

Assent being finally given, the contract was extended to the second and third levels, with the modification as to the grade.

The terms of the contract as to the ore from the first level were not affected, but remained in force.

It is well understood among mining men that the expression "on and above a certain level," means the space between the floor and roof of that level (see statement of first contract, page 34).

That it was the construction put upon the supplemental contract at the time, and at the time the plea was put in, and even on the trial, is shown by the plea (see Record, page 23).

In this case the defendant denies a breach of the contract on its part, and alleges a breach on the part of the plaintiffs, and seeks to recover damages because, among other things, plaintiffs did not remove all the ore they were bound to by said contract from the first level of the mine.

The jury found against the defendant on the question as to the breach of the contract, but to maintain the issue on the part of the defendant and establish its claim to damages as above stated the defendant proved by Mr. Bennett, its superintendent of the mine, that after the plaintiffs had "quit work" in the mine there was still left on the first level 15,000 to 20,000 tons of ore that would assay 56 per cent. (see page 62).

And on the same page the same witness testifies it cost defendant one dollar per ton to take out 1,500 tons of that ore. On page 63 defendant's witness Boss estimates as remaining on first level at about 20,000 tons, and the cost of taking out would exceed one dollar per ton, thus attempting to show a loss of 40 cents per ton above the contract price in case the jury should find the plaintiffs guilty of a breach of the contract.

It is clearly shown by the evidence of Bennett on page 62, and Channing on page 64 of Record, both defendant's witnesses, that the ore remaining on the first level contained at least 60 per cent. metallic iron; and there is no evidence in the record showing it to be of a lower grade, except the letter of Joseph Johns, which was explained to the satisfaction of the jury.

11. The eleventh assignment was considered in connection with the seventh.

12. The twelfth assignment relates to the refusal of the court to charge the jury, as requested by the defendant, as follows:

"There is no evidence from which the jury can find that any definite quantity of ore in addition to what was taken out by the plaintiffs, of the grade required by the contract, could have been taken out by them at a profit. Such profits would be altogether too contingent, uncertain and speculative to be allowed as damages in this suit."

It appears in the testimony of John Humble, page 44, that the cost of taking out the ore which was removed was 30 cents per ton, and the cost of taking out the ore remaining would be less than that amount; and on page 45 he gives measurements and estimates of the ore remaining in the first level. And on page 62 defendant's witness Bennett estimates the amount of ore remaining in said first level as being fifteen to twenty thousand tons, and that it would contain more than 56 per cent., and that in his opinion it was fully up to 60 per cent. of metallic iron.

Defendant's witness Boss, on page 63, estimates the amount of ore in the first level at nineteen or twenty thousand tons. And defendant's witness Channing, on page 64, shows that from analysis from samples lying all over the floor of the first level, the ore remaining on that level runs $62\frac{83}{100}$ per cent. of metallic iron.

This proof by defendant's witnesses was offered by defendant to support its claim for damages for not removing that quantity of ore in first level under its plea of recoupment that plaintiffs refused to take out such ore as provided in the contract. See also the letter of Mr. Tarbell, manager of defendant's company, on page 59, in which he states from estimates and measurements made by Boss and Channing there were 30,000 tons of good ore on first level.

13. The thirteenth assignment of error relates to the refusal of the court to charge the jury, as requested by defendant, as follows:

"There is no evidence from which the jury can find that the plaintiffs were prevented by the defendant from taking out all the ore they were entitled to take out under their contract."

There is evidence abundant that plaintiffs were prevented

from taking out ore on the first level, and the jury so found the fact. Plaintiffs again call attention of the court that defendant has shown, by its own witnesses, that the grade of the ore remaining on the first level would have entitled plaintiffs to take it out under their contract.

That they were hindered and delayed and finally wholly prevented from removing the ore appears by the testimony of plaintiffs' witness John Humble, on pages 44, 45, 47, and 50 of Record; by the testimony of James Johns, on pages 50, 51, and 52; by the testimony of John Rowe, on page 53, and the testimony of William Christopher, on page 54 of Record. It was the province of the jury alone to pass upon the weight of evidence.

14. The fourteenth assignment of error relates to the refusal of the court to charge the jury, as requested by defendant, as follows:

"If the plaintiffs refused or neglected to take out all the ore required by the contract to be taken out by them, but mined only such part thereof as could be mined by them at least expense, leaving that which could be mined only at a greater expense, they are not entitled to the contract price for such as they did mine, but only to the reasonable price for such as they did take out, and their claim for ore actually taken out must be reduced to such sum as would be a reasonable compensation therefor. If the amount paid them is equal to such reasonable compensation for all the ore mined by the plaintiffs, they are not entitled to recover anything further."

Plaintiff in error (page 23, brief) says:

"This request went on the hypothesis that the plaintiff had violated the contract."

Each party averred a breach of the contract by the other and claimed damages by reason thereof. They went to the jury upon that issue. The jury passed upon this disputed

point, and found the defendant guilty of the breach. It follows conclusively from that determination of fact that the defendant was not entitled to damages on account of the breach and the plaintiffs were so entitled and to recover for the work actually done. The general verdict in favor of the plaintiffs was in legal effect the same as a special finding of fact that the defendant had violated the contract.

This eliminates from the discussion the consideration of any question as to the proper measure of damages based upon a violation of the contract by plaintiffs and the point raised by this assignment.

Attention is called to the following special finding of the jury, although not directly bearing upon the question now being considered, to wit:

"Do the jury find that through the fault or negligence of the plaintiffs the defendants were required to and did pay a greater sum for freight upon the ore mined than they otherwise would have done?

"Ans. No" (p. 30.)

The rule contended for by defendant in a suit on the *quantum meruit* is not the legal rule of damages. A reasonable *price* for the work done, as stated in the request, is not the same as the reasonable *value* of the same.

The rule of damages, where plaintiff has failed to substantially perform a non-apportionable contract, is, he may recover the reasonable value of anything done under the contract, not exceeding the contract price, from which the other party has derived a substantial benefit and has appropriated.

Allen *v.* McGibben, 5 Mich. 449.
Wildey *v.* Paw Paw School District, 25 Mich. 419.
Wilson *v.* Wagar, 26 Mich. 452.
Begole *v.* McKenzie, 26 Mich. 470.

Moon *v.* Harder, 38 Mich. 566.
Gage *v.* Myers, 59 Mich. 300.
Wicks *v.* Swift Electric Light Co., 70 Mich. 322.

There is no evidence in the case of the reasonable value of getting out the ore, removed in September and October, other than the contract price. The cost paid by plaintiffs in getting out the ore is not the evidence of the value.

The presumption in such case is that the contract price is the value.

Gage *v.* Myers, 59 Mich. 300.

The court instructed the jury that there was no contradiction in the evidence as to the claim for ore which had been mined in September and October (which the testimony showed was $1,410, see page 49) (pages 69 and 70).

Also that the defendant could set off and recover for any damage from plaintiffs' neglect to produce ore as fast as the contract required (page 73, defendant's fifth request).

And also that defendant should recover damages, if any, in consequence of plaintiffs' failure to fully perform the contract (page 74, defendant's eighth request).

And see defendant's tenth request, on page 74, where it appears that the court instructed the jury (referring to damages to be given the defendant if plaintiffs abandoned the contract), "Such damages must go to reduce the amount, if any, found due the plaintiffs, and if such damages exceed the amount due the plaintiffs the defendant is entitled to a verdict for the balance."

Such damages as are referred to by the court to be given in favor of the defendant in case plaintiffs wrongfully neglected to take out all the ore would include the supposed difference between the contract price for ore taken out and not paid for, and the reasonable price therefor if the ore

most easily mined was taken out, as defendant would be entitled as damages the greater cost of taking out the ore which remained.

The giving or withholding the request could in no possible way influence the minds of the jury upon the question as to which party, plaintiffs or defendant, was guilty of a breach of the contract; *and the jury having found that issue in favor of the plaintiffs, the refusal of the instruction could in no way have injured the defendant.*

The amount of the verdict for plaintiffs was $5,943.79 (page 76 of Record); and the amount claimed for mining ore in September and October was $1,410. (See page 49 of Record.)

15. The fifteenth assignment of error is the same in substance as the thirteenth, and is considered under that assignment.

16. The sixteenth assignment of error relates to the instruction of the court to the jury as follows:

"If you find from the evidence that they (plaintiffs) have not fully completed the contract, but have performed it according to its terms as far as they were able to do so, and were prevented by reason of the unlawful interference of the defendant, then I charge you that they are entitled to recover of the defendant, first, for the number of tons that you shall find the plaintiffs have delivered to the defendant under and according to the terms of the contract at the price named in it, to wit, sixty cents per ton, less the amount you find the defendant has paid plaintiffs upon the contract."

The instruction which is the subject of this assignment of error is so plainly in accord with the settled rules of law that no extended discussion is called for.

"In an action upon the contract against the employer for preventing the complete performance, the contractor is en-

titled to recover the contract price, and in the absence of other damages the difference between the contract price and what it would cost to perform the contract as to the residue."

2 Sutherland, p. 522.

17. The seventeenth assignment of error relates to the instruction of the court to the jury as follows:

"If you find from the evidence that the plaintiffs have in good faith fairly performed the contract according to its terms, as far as they could, and have been interfered with and been prevented from the further performance of the contract by the unlawful interference of the defendant, then and in that case the plaintiffs are entitled to recover from the defendant all such gains and profits as they could and would have made had they been allowed to proceed and complete the contract according to its terms."

This instruction correctly states the law, as settled in Michigan, touching the damages and measure of damages for a breach of contract, and has already been discussed in connection with the eleventh and twelfth assignments of error.

This charge was limited by the court in his (see page 71 of Record) instruction to the jury that, as to the part of the contract not executed, plaintiffs would not have the right to mix ore to bring it up to grade. This rule was applied by the court in estimating profits. This latter rule is not conceded to be correct, but was very much in favor of defendant.

Also, the jury must have understood from the language of the court in giving defendant's third request as applied to the second and third levels (see page 73), that damages should not be allowed for loss of profits which were contingent, uncertain, or speculative.

"A party to a contract is entitled to recover against the

other party who violated it damages for the profits he would have made out of it if it had been performed. It is no objection to their recovery that they cannot be directly and absolutely proved. In the nature of things, the defendant having prevented such profits, direct and absolute proof is impossible. If there is no more certain method of arriving at the amount, the injured party is entitled to submit to the jury the particular facts which have transpired, and show the whole situation which is the foundation of the claim and expectation of profit, so far as any detail offered has a legal tendency to support such claim."

1 Sutherland on Damages, p. 113.

"When a party has contracted to perform labor from which a profit is to spring as a direct result of the work at a contract price, and he is prevented from earning this profit by the wrongful act of another party, the loss of this profit is the direct and natural result which the law will presume to follow the breach of the contract, and he is entitled to recover it without special allegations in his declaration. This he will be entitled to establish by showing how much less than the contract price it will cost to do the work or perform the contract."

1 Sutherland, pp. 117–18, and cases cited.

"An omission to perform some precedent or concurrent condition is such a prevention by the employer, and gives a right to damages for loss of profits on that part of the contract which he is thus prevented from executing

Grand Rapids R.R. Co. *v.* Van Dusen, 29 Mich. 431

"The profits which are permitted to be recovered are those which are the direct and immediate fruits of the contract. These are part and parcel of the contract itself, entering into and constituting a portion of its very elements, something stipulated for, the right to the enjoyment of which is as clear and plain as the fulfilment of any other stipulation. They are presumed to have been taken into consideration and deliberated upon before the contract was

made and formed, perhaps the only inducement to the arrangement.

2d Sutherland, p. 522.

18. The eighteenth assignment relates to the instruction by the court to the jury as follows:

"If you find that the defendant refused to receive good merchantable ore that would yield 56 per cent. in metallic iron, then and in that case the defendant cannot now complain, and the plaintiffs are not liable in damages for the failure to deliver the two hundred tons per day stipulated in the contract."

Page 71 of Record.

This assignment relates to the same question raised by the ninth assignment, as to the proper construction of the supplemental contract, and whether it changes the terms of the original contract, and is discussed under the ninth assignment.

The court stated in giving this charge that it was applicable to the first level (page 71).

Such instruction is only part of the charge on the subject (page 71).

The nineteenth, twentieth, and twenty-first assignments of error relate to charges of the court, which clearly and fairly state well-settled rules of law.

There was no rescission of the contract by the plaintiffs, nor an attempt at rescission, and the rules applicable thereto do not apply. On the contrary, the plaintiffs insisted upon the performance of the contract, and when prevented from doing so sued for the breach. They, not being in fault, and having in part performed the contract according to its terms *as conceded*, and prevented from completing it as *found by the jury*, were clearly entitled to recover the contract price for the ore actually removed, and damages for the breach as to that remaining.

They would be entitled to recover more than the contract price if proven to be worth more.

Kearney *v.* Doyle, 22 Mich. 294.

The contractor is entitled to recover the contract price for the work actually done *and*, in the absence of other damages, the difference between the contract price and what it would cost to perform the contract as to the residue.

2 Sutherland, p. 522–3, and many cases cited in note.

The twenty-second assignment relates to the charge of the court with reference to the letter written by one of the plaintiffs, of August 14, 1888, to defendant (see page 60), stating that nearly all the ore on the first level had been taken out, as follows:

"It is not, however, conclusive, and if the facts stated in that are shown to have been mistakenly stated, then what was there stated by these plaintiffs is not conclusive, and the jury are at liberty to find the other way."

Page 74 of Record.

This is only a part of the charge of the court on that subject, and among other things the court used the following language:

"Nevertheless, black and white testimony reduced to writing at the time when the transaction is going forward is generally regarded as being valuable in ascertaining, after the controversy has arisen, what the parties understood to be the truth at the time."

Page 74.

This letter was written by one of the plaintiffs, Joseph Johns, in the presence and at the request of Mr. Bennett, the defendant's superintendent, to the manager of defend-

ant's company (page 59), and Bennett evidently procured it to defraud his company in his own favor; or to entrap the plaintiffs by misrepresenting the object of the letter. The letter was fully explained by the evidence. And the testimony on the part of defendant showed the contents of the letter to be incorrect, as follows: the evidence of Manager Tarbell on page 59, of Superintendent Bennett on page 62, of Mr. Boss on page 63, and of Mr. Channing on page 64.

Also plaintiffs' witness John Humble, on page 45, testifies the letter was incorrect.

The twenty-third assignment of error relates to the conclusion of the jury upon the facts under the law as given by the court, and is not subject of review.

The controversy involved an issue of fact. No intricate or novel legal questions were agitated below, or are raised by the record in this court. The rights of both parties were studiously guarded in the introduction of evidence, and the law of the case well settled in a long line of adjudications was given to the jury with great clearness and care. No error is disclosed as against the defendant.

To it no injustice has been done. The judgment should be affirmed.

EDWIN F. UHL,
Counsel for Defendants in Error, Plaintiffs Below.

FRANK KUTTS,
Attorney for Plaintiffs.
BIRNEY HOYT,
Of Counsel.

Office Supreme Court U. S.
FILED.
MAR 26 1894
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1893.

THE ANVIL MINING COMPANY,
Plaintiff in Error,

vs.

JOHN HUMBLE and JAMES JOHNS,
Defendants in Error.

No. 323.

Brief for Plaintiffs in Error in Reply to Defendants' Brief.

The definition given by counsel for defendant, on pages 2 and 3, of "the caving system" of mining, is hardly correct, either in fact or in accordance with the evidence. He represents the miner under that system as excavating his levels and drifts on a sharp incline, sufficient to cause the broken ore to run down by its own weight through the chutes. Such a method of mining would necessarily leave the larger portion of the ore in the floor of the mine, as the incline would necessarily have to be 45 degrees or upwards, and even then the ore, unless broken very fine, would not run down. The explanation of the caving system given by the plaintiff, Humble, in his testimony, is very vague and indefinite. All he says about it is found on page 40 of the Record, and is as follows:

"The process of caving is to take a portion of ground, cut it up into blocks, leave small pillars, and then drill a hole in each of these pillars; charge it with an explosive and blow it all out, and let the ore come right down towards you. After we had cut up our ground we put a chute in below where we were going to cave, and then we would take out those pillars: we would run the ore through that chute, and if the dirt came we would close that chute and leave it."

This would indicate that his design was to excavate underneath the body of ore he was going to take out, then put in a chute underneath it, blow out the pillars, caving down the body of ore, and depend upon its running out through the chute like grain. But caving down the ore in this way necessarily brings down with it the surface of rock and earth that lies above the ore. Attempting to draw out the ore in that way, even though it were fine and would run like wheat, would necessarily bring down the dirt and surface long before the ore had all run out.

The witness Bennett, on page 57, testifies to the explanation of this system of mining given to him by the plaintiff. He explains the system to be "cutting out rooms, leaving pillars, removing the ores from the rooms, and allowing them to fill with *debris*, and finally taking out the pillars, commencing at a point farthest from the tram-road and shaft." Any one can readily see that a mine could not be worked in the method described by the witness Humble, as given in his testimony; it would be a physical impossibility. The only difference between mining by the caving system and any other is this: By either system the ore is first taken out, but if it is not designed to cave the mine strong timber-work is built up to support the roof, or, as miners call it, the back. In the caving system so much of the ore is taken out as can safely be removed, leaving pillars for support, and perhaps some timbering, and then when all the ore

that can be so removed is taken out the pillars are removed one by one, and the whole surface of the mine is allowed to cave in. The advantage is that it saves the expense of timbering to support the surface. The system that defendants seem to have adopted was caving the entire mine in the first instance, and depending upon the broken ore running out.

In discussing the sixth assignment of error, on pages 6 and 7 of defendants' brief, counsel attempts to avoid the force of the objection by asserting that the defendants' books were in evidence, which showed the same thing as the statement concerning which the witness Humble was allowed to give oral testimony. This is a mistake. By referring to page 57 of the Record, it will be seen that the witness Bennett produced the shipping-book and testified from it merely to show the shipments of ore on the 9th and 10th of May, 1888. The plaintiffs had testified that owing to the failure of the defendants to furnish cars to hoist the ore, although they commenced mining on the 7th, they were unable to ship any ore until the 11th. In order to show that that was untrue, Bennett produced the books, and testified from them to shipments on the 9th and 10th. That was the only use that was made of these books on the trial. As we have urged before, the testimony was faulty for two reasons: *First*, because it is testimony of admissions by a mere bookkeeper who is not shown to have any authority to make admissions for the company; and, *second*, because it is oral testimony of the contents of document, which is not produced, nor was any reason given for its non-production. The only evidence in the case of the quantity of ore shipped, aside from the shipments of the first two days, was that given by the plaintiffs below, and this incompetent testimony was a part of it.

The counsel insists that the testimony referred to in our eighth assignment of error, in which the plaintiff

below was allowed to relate a conversation between himself and Bennett about a contemplated suppression of facts relating to any discovery they might make, was admissible as explanatory of the writing of the letter which we introduced in evidence. How such a conversation can have any relation to or connection with the writing of the letter, we can not understand. It related entirely to a different subject. The letter was concerning the exhaustion of the ore on the first level; this conversation related to a possible rich discovery on the third level. It does not suggest that the plaintiffs below could make any money out of it, so that it might be considered as a bribe to them to write the letter, but it purports to be a mere request to the plaintiffs to keep any such discovery quiet, so that they—Bennett and those connected with him—could make some money out of it. Besides, it does not appear to have been a part of the conversation which related to the writing of the letter. The question which called up the testimony, it is true, was, "did he have anything to say at that time about getting the stockrun down," etc. The answer was, "Yes; he mentioned to me *one time* if we should strike anything good in the bottom lift, to keep quiet," etc. The only object, we repeat, in introducing the evidence, was to attempt to show that Bennett had been guilty of a dishonest act, or dishonest attempt to defraud the stockholders of his company, and was not to be believed. No foundation had been laid for that as an impeaching question, nor would it have been relevant even if the foundation had been laid.

In this same connection counsel attempts to show that it appeared by our own witnesses that there was a large amount of ore of the quality required by the contract remaining on the first level. He has misconceived the purport of the testimony.

The testimony of Boss, on page 63, relates to the con-

dition of things in December, 1887, some months before this contract was made. He does not attempt to give the grade of the ore, because he does not know; he does say, however, that it was streaked with sand and rock, and that the sand and rock would amount to *at least 15 per cent.* When this ore was blasted and caved down in the manner shown by the evidence, the sand and rock entered into the composition of the mass, and if the "ore proper," as Bennett calls it, before caving had been 60 per cent., the whole mass mixed up would be reduced to 45 per cent. The ore that assayed 62.83 per cent., according to the testimony of Boss and Channing, was the ore in the room next the shaft *in the south or foot-wall lens;* it had no relation whatever to the ore in the main body, what the witness called the inside lens. This is the room which Channing, the county mining inspector, had ordered to be timbered up, and had forbidden any more work there until the timbering was done. Of this room the plaintiff, Humble, on page 49, says: "We had quit working there, and *there was no ore then to get.* There was broken ore in the room, which Mr. Channing speaks of, but there was no more ore in the lift, and *we had abandoned the mining of it.*" Mr. Bennett, on page 62, says: "The average of the ore proper in the first level, I should think, was fully up to 60 per cent. metallic iron." But he is speaking of the ore as it originally was in the first level, and not as it was left by the defendants. Besides, he confines his remarks to the "ore proper," which, of course, excludes the seams of rocks and sand, some of which were five and six inches in thickness (pp. 50 and 51), which extended all through the ore body. As we have before said, when it was all broken and mixed together this foreign matter greatly reduced the percentage of iron.

The modification of the contract is treated by defendants' counsel as a new contract applying exclusively to

the second and third levels. The supplemental clause says: "This contract shall *extend to and include* the ore contained *on and above* the second and third levels." This by its terms covers all the ore from the floor of the third level to the surface of the ground. The attempt is made to limit the meaning of the word "above" in that connection to the ore between the floor and the roof of the level, but before a level is opened up there is no floor or roof. Counsel in his brief says (page 2): "The ore on and above the floor is the ore in any given level." That we understand to be correct. The whole space from the floor to the roof is called the level: the ore that fills that space, is the ore *in or on that level*, and ore above that level, must necessarily include all the ore in the levels above it. There may be ore above the first level that can not strictly be said to be *in the level;* the top or apex of a deposit of ore may be irregular, and there may be small bodies of ore extending above what may be considered the level; that is, above the main body of the ore mined from that level. The word "above" in connection with the first level would include all such ore, but the word "above" in connection with a lower level must, of course, include all the ore in the levels above it.

It is said that what we claim as a change in the contract is nothing but an exception. It is more than that. The supplemental clause provides that this contract shall cover all the levels, with the exception that *one of its provisions is changed*, and that change is clearly and distinctly stated.

It is claimed that the plaintiff in error by its pleading has given a construction to this contract. There are several difficulties in the way of that proposition. *First*, what counsel calls a pleading is nothing but a notice of special defenses, given under the plea of the general issue. The statute of Michigan prohibits special pleas; it provides that the only plea shall be the general issue,

and that notice of special defenses may be given under that plea. But the notice is not a pleading; no issue can be joined upon it, nor is it demurrable; the party giving the notice is not prejudiced by it, and his evidence, if admissible under the general issue, can not be excluded because it varies from or is contrary to the matter stated in the notice. (See Howell's Annotated Statute, secs. 7361 and 7363.

1st Green's Practice (Mich.), 223–224;
McHardy *v.* Wadsworth, 8th Mich., 349;
Rosenburg *v.* Angell, 6th Mich., 514;
Porter *v.* Kimball, 1st Mich., 2423.
Smith *v.* Gregory, 8th Cowen, 114.

Second. The notice from which the quotation is taken, appearing on page 23 of the Record, does not give any such construction to the contract as is claimed; it gives notice that the defendants below will attempt to prove that the contract, taking the most extreme view of it in favor of the plaintiff, has not been fulfilled.

Third. The construction of the written contract is a matter of law. Facts may be admitted, and the party will be bound by the admission; but questions of law are for the decision of the court.

As to a practical construction of the contract after it was made, we find nothing whatever in the acts of the parties indicating that a 56 per cent. ore will answer the contract from any part of the mine. The letter of defendant to plaintiff July 12th, which is quoted by counsel, is a part of the negotiation *before the contract was made.*

The contract as made must govern without regard to what was said or written between the parties before it was closed. The letter of July 12th speaks only of extending the contract *to the second level.* The extension when made included the third level, so that what was actually done was not merely what was contemplated

when the letter of July 12th was written. The attempt is made to show that this construction was immaterial, because there was said to have been plenty of ore on the first level that contained 60 per cent. metallic iron. This we have shown is a mistake. There is no evidence that the ore in the condition in which it was left could be gotten out so as to yield even 56 per cent.

Our fourteenth assignment of error, discussed by counsel on pages 23 to 26 of his brief, was based upon the assumed fact that there was abundant evidence that the mining of the ore left by the defendants in the mine would be much more expensive to take out than that which they removed. In our brief we stated, as quoted by counsel, that this request went on the hypothesis that the plaintiff had violated the contract. We submit, however, that the result would be the same even though the violation was on the part of the defendant below. There was a large quantity of ore to be removed, some of which could be taken out at very slight expense, while other portions would be much more expensive to remove. Even though the contract was wrongfully terminated by the defendant below, we take it that the plaintiffs having removed a small portion of the ore which could be taken out at a mere nominal cost, would not be entitled, as a part of their damages, to the average contract price for wh t they took out, but only to its value. Counsel says that there is no evidence of the reasonable value of the ore removed in September and October, other than the contract price; and that in that case the presumption is the contract price is the value. It is true there is no evidence of what the reasonable value would be, but there is evidence that it is less than the average contract price. If the plaintiffs would recover the reasonable value of taking it out, it is incumbent upon them to prove that value.

In answer to our nineteenth assignment of error, which

relates to the charge of the court to the effect that the plaintiffs below might under certain circumstances abandon their contract and at the same time sue for damages for breach of it, counsel says there was no rescission or attempt at rescission by the plaintiffs, and that the jury must have found that they were stopped and prevented from carrying out the contract. This can not be known. The jury were allowed to find a verdict for damages against the defendant below on either one of two theories: First, that the defendant had wrongfully terminated the contract and prevented them from carrying it out; Second, that the defendant had, by interfering with the work and failure to perform on its part as promptly and rapidly as the contract required, caused the plaintiffs such delays as entitle them to damages *for such delay*. It can not be known whether the jury gave damages on the first or second theory. The entire damages which they gave in addition to the amount due for ore shipped may have been based upon damages for delay, and not upon stoppage of the contract at all. The instruction referred to allowed the jury in such case to give damages for the delay; and if the plaintiffs voluntarily quit and abandoned the contract on account of such delay, it allowed a verdict for all the profits they *might have made* if they had not abandoned it.

DAN. H. BALL,
JAMES G. FLANDERS,
For Plaintiffs in Error.